SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 80.

CHARLES CLARKE AND ROBERT P. CLARKE,

PETITIONERS,

vs.

THE STEAMSHIP "EL PRIDE," A. PYMAN, SOLE OWNER, ET AL.,

CLAIMANTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR CERTIORARI FILED FEBRUARY 24, 1898.

CERTIORARI AND RETURN FILED MARCH 28, 1898.

(16,494.)

(16,494.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 308.

CHARLES CLARKE AND ROBERT P. CLARKE, PETITIONERS,

vs.

THE STEAMSHIP "ELFRIDA;" PYMAN, BELL & CO., CLAIMANTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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a UNITED STATES OF AMERICA, }
Fifth Judicial Circuit. }

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth circuit, begun, pursuant to law, on the third Monday of November, 1896, and held in the court-room of said court, in the city of New Orleans, State of Louisiana, before the Honorable Don A. Pardee, United States circuit judge for the fifth judicial circuit; the Honorable A. P. McCormick, United States circuit judge for the fifth judicial circuit, and the Honorable Emory Speer, United States district judge for the southern district of Georgia.

PYMAN, BELL & COMPANY, Claimants of Steamship "Elfrida," Appellants,
vs.
CHARLES CLARKE & COMPANY, Appellees. } No. 458.

Be it remembered, that heretofore, to wit, on the 20th day of January, 1896, a transcript of the record of the above-stated cause, from the district court of the United States, for the eastern district of Texas, was filed in the office of the clerk of the United States circuit court of appeals for the fifth circuit, and is in the words and figures following, to wit:

1 In the District Court of the United States for the Eastern District of Texas, Holding Sessions at Galveston.

CHARLES CLARKE and ROBERT P. CLARKE (Composing the Firm of Charles Clarke & Co.), Libelants,
vs.
BRITISH STEAMSHIP "ELFRIDA," HER TACKLE, Apparel, and Furniture—Pyman, Bell & Co., Claimants—Respondents. } No. 672. In Admiralty.

Be it remembered, that in the above entitled and numbered cause, in which a final hearing and decree was entered at the regular October term, 1895, of said court, holding sessions at Galveston, to wit, on the 29th day of October, 1895, the Honorable David E. Bryant, United States district judge for the eastern district of Texas, presiding, the following proceedings were had and taken in said cause in said court, to wit:

2 *Warrant of Seizure and Marshal's Return Thereon.*

District Court of the United States, Eastern District of Texas.

The President of the United States of America to the marshal of the eastern district of Texas, Greeting:

Whereas, a libel hath been filed in the district court of the United States for the eastern district of Texas, on behalf of Chas. Clarke &

Co., composed of Chas. P. Clarke and Robert P. Clarke, against Steamship *Elfrida*, her tackle, apparel and furniture, for reasons in the said libel mentioned, and praying the usual process and monition of the said court in that behalf to be made, and that all persons interested in the said steamship *Elfrida*, her tackle, &c., may be cited in general and special to answer the premises, and that all due proceedings being had, that the said steamship *Elfrida*, her tackle, &c., may, for the causes in the said libel mentioned, be condemned, and the proceeds thereof distributed:

You are, therefore, hereby commanded to attach the said steamship *Elfrida*, her tackle, &c., and to detain the same in your custody until the further order of the court respecting the same.

Herein fail not, and of this writ make due return forthwith, and what you shall have done in the premises.

Witness the Honorable David E. Bryant, judge of said court, and the seal thereof, at Galveston, in said district, this 24th day of October, A. D. 1894, and of American Independence the one hundred and nineteenth year.

[SEAL.] C. DART,
Clerk U. S. District Court, Eastern District of Texas,
at Galveston,
By W. L. HANSCOM, *Deputy.*

3 *Marshal's Return.*

Rec'd this writ on the 24th day of Oct., 1894, and I executed the same on the 25th day of Oct., 1894, by seizing and taking in my possession, in the town of Velasco, in Brazoria county, in my district, the steamship *Elfrida*, her tackle, &c., and appointed F. A. Brock, Jr., keeper of the same.

J. S. WILLIAMS,
U. S. Marshal, East. Dist. Texas,
By WM. P. OWENS, *Deputy.*

(Endorsements:) No. 672. Chas. Clarke & Co. *vs.* Steamship *Elfrida*, her tackle, &c. Warrant of seizure. Issued twenty-fourth day of October, A. D. 1894. C. Dart, clerk, by W. L. Hanscom, deputy. Returned and filed Oct. 26, 1894. C. Dart, clerk, by W. L. Hanscom, deputy.

Monition and Marshal's Return Thereon.

UNITED STATES OF AMERICA,
Eastern District of Texas.

In U. S. District Court at Galveston.

CHAS. CLARKE & Co.
vs.
STEAMSHIP "ELFRIDA," &C. } No. 672.

The President of the United States of Americ to the marshal of the eastern district of Texas, Greeting:

Whereas, return having been made that the warrant of seizure issued in the above cause, on the 24th day of October, A. D. 1894, has been duly executed, and that the property therein mentioned is now in custody of the marshal:

4 You are therefore hereby commanded to give notice to all persons claiming the said steamship *Elfrida*, her tackle, apparel and furniture, or knowing or having anything to say, why the same should not be condemned and forfeited and the proceeds thereof distributed according to the prayer of the libel, that they be and appear before the said court, to be held in and for the eastern district of Texas, at the United States court-rooms, in the city of Galveston, on the 12th day of November, A. D. 1894, at 10 o'clock on the forenoon of that day, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. And what you shall have done in the premises do you then and there make return, together with this.

Witness the Honorable David E. Bryant, judge of said court, and the seal thereof, at Galveston, in said district, this 26th day of October, A. D. 1894, and of American Independence the one hundred and nineteenth year.

[SEAL.] C. DART,
Clerk U. S. District Court, Eastern District of Texas, at Galveston.
By W. L. HANSCOM, *Deputy.*

Marshal's Return.

Received this writ on the 26th day of October, 1894, and I executed the same on the 28th day of October, 1894, by causing a true copy of this monition to be published in the *Galveston Daily News*, a newspaper regularly published in Galveston county, for three times, viz., October 28th, November 4th and November 11th, 1894.

J. S. WILLIAMS,
U. S. Marshal, E. D. T.,
By WM. P. OWENS, *Deputy.*

(Endorsements:) "No. 672. Chas. Clarke & Co. *v.* Steamship *Elfrida*, her tackle, &c. Monition. Issued twenty-sixth day of October, A. D. 1894. C. Dart, clerk, by W. L. Hanscom, deputy. Returned and filed Nov. 12, '94. C. Dart, clerk, by W. L. Hanscom, deputy."

5 *Bond of Libelant.*

District Court of United States of America, Eastern District of Texas.

CHARLES CLARKE & Co.
vs.
STEAMSHIP "ELFRIDA," &c. } No. 672. In Admiralty.

Whereas, a libel was filed in said cause by Chas. Clarke & Co., composed of Charles Clarke and Robert P. Clarke, against said steamship *Elfrida*, her tackle, &c., for the reasons and causes in said libel mentioned, Jens Möller and J. H. Langbehn, as sureties, and the said libelants consenting and agreeing that in case of default or contumacy on the part of said libelants and their sureties execution may issue against their goods, chattels and lands for the sum of two hundred and fifty ($250) dollars:

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned are bound in the sum of two hundred and fifty ($250) dollars, conditioned that the libelants above named shall pay all such costs as shall be awarded against them by this court, or on appeal by the appellate court.

CHAS. CLARKE & CO. [SEAL.]
JENS MÖLLER. [SEAL.]
J. H. LANGBEHN. [SEAL.]

Taken and acknowledged before me this 24th day of October, A. D. 1894.

W. L. HANSCOM,
[SEAL.] *Commissioner U. S. Circuit Court, E. D. T.*

6 EASTERN DISTRICT OF TEXAS, *ss:*

Jens Möller, party of the stipulation above, being duly sworn, deposes and says that he is worth the sum of two hundred and fifty ($250) dollars, exclusive of property exempt from execution by the laws of the State of Texas.

JENS MÖLLER.

Sworn and subscribed to before me this 24th day of October, 1894.

W. L. HANSCOM,
[SEAL.] *Commissioner U. S. Circuit Court, E. D. T.*

EASTERN DISTRICT OF TEXAS, *ss:*

J. H. Langbehn, party of the stipulation above, being duly sworn, deposes and says that he is worth the sum of two hundred and fifty

($250) dollars, exclusive of property exempt from execution by the laws of the State of Texas.

J. H. LANGBEHN.

Sworn and subscribed to before me this 24th day of October, 1894.

W. L. HANSCOM,

[SEAL.] *Commissioner U. S. Circuit Court, E. D. T.*

(Endorsements:) "No. 672. Chas. Clarke & Co. *vs.* Steamship *Elfrida*, etc. Libellants' stipulation for costs. Filed 24 day of October, A. D. 1894. C. Dart, clerk, by W. L. Hanscom, deputy."

7 *Bond of Claimant.*

District Court of United States of America, Eastern District of Texas.

CHARLES CLARKE & Co. *vs.* S. S. "ELFRIDA," HER TACKLE, &c., Claimant. } No. 672. In Admiralty.

Whereas a libel was filed in said cause, by Charles Clarke & Co. against said S. S. *Elfrida*, her tackle, &c., for the reasons and causes in said libel mentioned, and whereas Pyman, Bell & Co. have appeared and filed their claim for said S. S. *Elfrida*, her tackle, &c., by Benjamin Burgess, master, &c., and the said Pyman, Bell & Co., claimants, as principals, and M. Lasker and M. Ullmann, as sureties, and the said claimants consenting and agreeing, that in case of default or contumacy on the part of said claimants and their sureties, execution may issue against their goods, chattels and lands, for the sum of two hundred and fifty ($250) dollars:

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators, undersigned, are bound in the sum of two hundred and fifty ($250) dollars, conditioned

8 that the claimants above named shall pay all costs as shall be awarded against him by this court, or on appeal by the appellate court.

For PYMAN, BELL & CO.,
BENJ. BURGESS, *Master.* [SEAL.]
M. LASKER. [SEAL.]
M. ULLMANN. [SEAL.]

Taken and acknowledged before me this 26th day of October, A. D. 1894.

[SEAL.] W. L. HANSCOM,
Commissioner U. S. Circuit Court, E. D. T.

EASTERN DISTRICT OF TEXAS, *ss:*

M. Lasker, party of the stipulation above, being duly sworn, deposes and says that he is worth the sum of two hundred and fifty ($250) dollars, exclusive of property exempt from execution by the laws of the State of Texas.

M. LASKER.

Sworn and subscribed to before me this 26th day of October, 1894.
[SEAL.] W. L. HANSCOM,
Commissioner U. S. Circuit Court, E. D. T.

EASTERN DISTRICT OF TEXAS, *ss:*

M. Ullmann, party of the stipulation above, being duly sworn, deposes and says that he is worth the sum of two hundred and fifty ($250) dollars, exclusive of property exempt from execution by the laws of the State of Texas. M. ULLMANN.

Sworn and subscribed to before me this 26th day of October, 1894.
[SEAL.] W. L. HANSCOM,
Commissioner U. S. Circuit Court, E. D. T

"No. 672. Chas. Clarke & Co. *vs.* S. S. *Elfrida*, etc. Stipulation for costs of Pyman, Bell & Co., claimant. Filed 26th day of Oct., A. D. 1894. C. Dart, clerk, by W. L. Hanscom, deputy."

9 *Stipulation of Claimant to Abide Decree.*

District Court of the United States of America, Eastern District of Texas.

CHARLES CLARKE and ROB'T P. CLARKE, Composing Firm of Charles Clarke & Co., *vs.* S. S. "ELFRIDA," HER TACKLE, ETC. } No. 672. In Admiralty.

Whereas, a libel was filed in this court, on the 24th day of October, in the year of our Lord one thousand eight hundred and ninety-four by Charles Clarke & Co. against the said S. S. *Elfrida*, her tackle, etc., for the reasons and causes in said libel mentioned, and a claim has been filed by Pyman, Bell & Co., and the said claimant, and M. Lasker and M. Ullmann, his sureties, the parties hereto hereby consenting and agreeing, that in case of default or contumacy on the part of the claimant, or his sureties, execution may issue against their goods, chattels and lands, for the sum of forty-four thousand dollars:

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators, undersigned are, and each of them is bound in the sum of forty-four thousand dollars, conditioned that the claimant above named shall abide by and pay the money awarded by the final decree rendered in the cause by this court, or in case of appeal by the appellate court.

For PYMAN, BELL & CO.,
BENJ. BURGESS, *Master.* [SEAL.]
M. LASKER. [SEAL.]
M. ULLMANN. [SEAL.]

Taken and acknowledged this 26th day of October, 1894, before me—
[SEAL.] W. L. HANSCOM,
Commissioner U. S. Circuit Court, E. D. T.

10 EASTERN DISTRICT OF TEXAS, *ss:*

M. Lasker and M. Ullmann, parties of the above stipulation, being duly sworn, depose and say each for himself, that he is worth the sum of forty-four thousand dollars over and above all his just debts and liabilities.

M. LASKER.
M. ULLMANN.

Sworn to before me this 26th day of October, 1894.

[SEAL.] W. L. HANSCOM,
Commissioner U. S. C. C., E. D. T.

Approved October 26, 1894.

DAVID E. BRYANT, *Judge.*

(Indorsements:) "A. D., No. 672. Chas. Clarke & Co. *vs.* S. S. *Elfrida*, &c. Stipulation of claimant to abide decree. Filed 26 day of October, 1894. C. Dart, clerk, by W. L. Hanscom, deputy."

Writ of Release.

United States District Court, Eastern District of Texas, at Galveston.

CHARLES CLARKE & Co. *vs.* STEAMSHIP "ELFRIDA," &C. } No. 672. Admiralty.

The President of the United States of America to the marshal of the United States for the eastern district of Texas, Greeting:

Whereas a claim has been filed by the owners of said vessel
11 and also stipulation for release with good and sufficient sureties in the sum of $44,000, and approved by the judge of said court:

You are hereby commanded to release said steamship *Elfrida*, her tackle, apparel and furniture.

Herein fail not.

Witness the Hon. David E. Bryant, judge of said court, and the seal thereof, at the city of Galveston, this the 26th day of October, A. D. 1894.

[SEAL.] C. DART, *Clerk*,
By W. L. HANSCOM, *Deputy.*

Marshal's Return.

Rec'd this writ on the 26th day of Oct., 1894, and in accordance with the within order released said steamship, her tackle and apparel and furniture, and withdrew the keeper, F. A. Brock, Jr., therefrom.

J. S. WILLIAMS,
U. S. Marshal, E. D. T,
By WM. P. OWENS, *Deputy.*

(Endorsements:) "A. D., No. 672. Chas. Clarke & Co. *vs.* Steamship *Elfrida*, her tackle, &c. Writ of release. Issued October 26th, 1894. C. Dart, clerk, by W. L. Hanscom, deputy. Returned and filed October 27th, 1894. C. Dart, clerk, by Geo. H. Burnett, deputy."

12 *Libel.*

Filed October 24, 1894.

UNITED STATES OF AMERICA, }
Eastern District of Texas. }

In the United States District Court for the Eastern District of Texas, Sitting at Galveston.

To the Hon. David E. Bryant, judge of said court:

The libel of Charles Clarke and Robert P. Clarke, composing the firm of Charles Clarke & Co., of Galveston, Texas, against the British steamship *Elfrida*, her tackle, apparel and furniture, B. Burgess, captain, of Newcastle, England, and of which Messrs. Pyman, Bell & Co., of Newcastle, England, are the owners, and are non-residents, and against all persons intervening for their interest therein, in a cause of salvage, civil and maritime, allege- as follows:

First. That on or about the 5th day of October, 1894, said steamship, while proceeding to the port of Velasco, ran aground on the beach near Quintana, Texas, where she became embedded in the sand and threatened to become a total wreck. That after being in her stranded, perilous position for several days, her said master, acting for and by special authority of said owners, entered into a contract in writing with said Charles Clarke & Co. to float said vessel, agreeing and binding said ship, her tackle, apparel and furniture in the sum of $22,000, to be paid to Charles Clarke & Co., for and in consideration of which sum of money the said Charles Clarke & Co. contracted and agreed to float said vessel, and further agreed that if said vessel was not considered by the said captain, after being floated, to be worth the said sum of $22,000, that she was to be tendered to said Clarke & Co., and said Clarke & Co. bound
13 themselves to make no other claim on the said steamship, her captain or her owners, but to except said steamship in full payment for all work and labor performed by said Clarke & Co. in floating said steamship. That said contract was made at Velasco, in Brazoria county, Texas, and bears date October 15, 1894, and that said libelant is prepared and ready to produce said contract on the trial of this cause.

Second. That for and in consideration of the said sum of $22,000 the said Charles Clarke & Co. undertook said contract, and executed the same by floating said steamship, as provided for by said contract, in a sufficient depth of water, where said vessel now lies at the port of Velasco, and that said firm of Charles Clarke & Co. has in good faith carried out all the promises, agreements and covenants made with the captain of said steamship, who was duly authorized

and empowered to act for her owners, but that said captain and owners of said steamship, though frequently requested, have totally failed and refused to pay over to said Charles Clarke & Co. the sum of $22,000, as agreed upon, for the services so rendered by said Chas. Clarke & Co., and have refused to turn over said steamship to them in lieu of said money, and that said Charles Clarke & Co. claim the sum of $22,000 as per contract for salvage, for saving said ship and cargo.

Third. That all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States and of this honorable court.

Wherefore the libelants pray that process in due form of law, according to the course of this honorable court in cases of admiralty and maritime jurisdiction, may issue against the said steamship *Elfrida*, her tackle, apparel and furniture and cargo, and that all persons claiming any interest therein may be cited to appear and answer upon oath all and singular the matters aforesaid, and that this honorable court will be pleased to decree to the libelants the sum of $22,000, and that the said steamship, her tackle, apparel and furniture and cargo may be condemned and sold to pay said salvage, with interest, costs, charges and expenses, and that the libel-
14 ants may have such other and further relief in the premises as in law and justice they may be entitled to receive.

CHARLES CLARKE & CO.

JOSEPH H. WILSON, *Proctor.*

Subscribed and sworn to before me, by Chas. Clarke, this 24th day of October, 1894.

C. DART,
Clerk U. S. District Court, East'n Dist. of Texas,
at Galveston,
[SEAL.] By W. L. HANSCOM, *Deputy.*

(Endorsements:) A. D., No. 672. Charles Clarke & Co. *vs.* Steamship *Elfrida*, &c. Libel for salvage. Filed Oct. 24, 1894. C. Dart, clerk, by W. L. Hanscom, deputy.

Amended and Supplemental Libel.

Filed Oct. 21, 1895.

In United States District Court for the Eastern District of Tex., at Galveston.

CHAS. CLARKE & CO.
vs.
THE STEAMSHIP "ELFRIDA," HER TACKLE, &O. } A. D., No. 672.

Now come Chas. Clarke & Co., libelants in above cause, and, with leave of the court, file this their amended and supplemental libel,

and except to the amended answer of claimants herein, be-
15 cause the same presents no sufficient grounds for the rescission of the contract declared on, and the averments seeking to excuse or justify the repudiation thereof are so general and indefinite as not to give libelants any legal or proper notice of what may be sought to be proven under or in support of the answer; and libelants specially except as follows:

1. To that part of the second article of the answer which claims that the master of the *Elfrida*, in reporting to her owners her position and danger, relied chiefly upon information furnished to him by Lloyd's agent at Galveston, and by his own agents, J. Moller & Co., and by the libelants and persons interested with them in obtaining a contract for the salvage of said steamer, because it does not appear that said master would not have so reported upon the information or advice of Lloyd's agent alone, or that of his own agents, or of both, independently of anything that might have been said or done by libelants and persons interested with them, and because the persons alleged to have been so interested should have been in some way described or identified if they could not be named, or some excuse given for the failure so to do, and claimants are now hereby called upon to designate such unnamed persons so that libelants may meet their charges with specific proof, as such vague assertions form no basis for the admission of evidence.

2. Libellants further except to said second article, because it does not appear therein or elsewhere to what extent the master acted upon or was influenced by any information given by libelants or on their behalf.

3. They further except to the second article, because it does not appear therein or elsewhere that either Lloyd's agent or the steamer's agents were in any manner connected, concerned or interested with libelants.

4. They also except to that part of said article second which avers that it was reported to the captain that there were no other salvors or apparatus sufficient to save his vessel except libelants and one other firm in Galveston, and that an offer on his part to obtain as-
sistance from New Orleans or elsewhere would only result in
16 larger expense to the steamer, because it is not shown who made such report, nor that these libelants were responsible therefor, nor is it alleged that such report or statement was untrue.

5. Similar objections apply to that part of said article which says, "It was further represented to him by the said persons that the ship was in a position of great danger, which was likely to be aggravated by the formation of sand banks about her." The words "said persons," so far as they refer to any persons theretofore named and described, do not advise libelants as to how far their words or acts influenced said master, if at all, nor is any reason or right shown why the contract should be avoided on account of statements or conduct of others not acting with or for these libelants, and they are entitled to be informed who the persons are.

6. They further except to said answer and said second article because no facts are stated excusing or relieving said master from the

duty of making direct inquiry of other salvors if not satisfied with the tenders solicited and received by him.

7. The averments with regard to the interception of a cable which instructed the acceptance of the tender of £4,580 "if lower impossible," are too broad and vague and there is no description or identification of the persons against whom the accusations are made, nor is it stated that the captain could or would probably have obtained a lower tender or contract but for the alleged opening of said cable.

8. They further except to all charges of collusion of other persons with libelants, as no specification of the transactions or persons complained of is given, and such sweeping and indefinite charges of misconduct, fraud and collusion are scandalous and impertinent and form no legal or equitable foundation for introduction of evidence, and should be stricken out.

9. Libelants further except to all those statements in articles 2 and 3 and elsewhere in said answer which charge, in effect, as pretext for evasion of liability, that libelants' services were slight, or 17 occupied little time, and required little labor or expense, and that the steamer co-operated in being removed into deep water, because, if they were all true, as they are not, they cannot affect the validity of a contract freely, fairly and voluntarily made by said master, under authority of his owners.

10. All the allegations as to mutual mistake of fact are insufficient and should be stricken out, because no reason is shown why said master could not have correctly informed himself, nor have sought competent and disinterested advice, and his failure so to do, if such were the fact, should not be charged against these libelants, nor be made the means of escape by claimants from liability under a fair and equitable contract.

11. Libelants specially except to the third article of the answer, because no sufficient reason or excuse is given for the failure of said captain or the owners to be fully apprised of the true situation and danger of said vessel; nor are the charges of fraudulent representations made to him by libelants, or by persons acting in their behalf, or for their benefit, sufficient, because such representations are not set out, nor are the rules of pleading complied with by reference to persons acting in their behalf, as heretofore shown; they should be in some manner more particularly designated.

12. Libelants except to the averment that the contract was improvidently made for a highly exorbitant and excessive compensation, because such averment is a mere conclusion, and not the statement of any facts showing wherein, or to what extent the compensation provided for by the contract was excessive.

13. They except to the claim that the contract was made without a proper or true understanding or appreciation of the situation and comparative freedom from danger of the vessel, because no facts are shown excusing the master's alleged failure to know what he was about, or to understand the risk, nor are libelants sufficiently connected with said failure by the answer to hold them responsible therefor, or to invalidate the contract.

14. The averment in the third article, that the contract
18 was obtained from the master by libelants or persons acting for them, taking undue advantage of the distress of the master's situation and that of his vessel by withholding information from him as to the true position and situation of the vessel, and as to other possible means of her relief, and by exaggerating to him her danger, are insufficient, for reasons hereinbefore set out, and because it is not stated what information was withheld; nor what exaggerations indulged in; nor who the persons were other than libelants that so spoke or acted; nor why it was that the master or officers were unable, by the exercise of intelligence and care to learn the full nature, during the period of nearly two weeks, of the situation of the vessel, and any exposure or risk to which she was subject from the winds and waves, banking of sand, or other causes.

Wherefore libelants pray that all of said exceptions be sustained and said answer be stricken out and held for naught, and they pray for judgment for their debt, interest, costs and general relief.

CHAS. CLARKE & CO.,
By their proctors, JOS. H. WILSON and
JAMES B. & CHARLES J. STUBBS.

1. And for further reply and amendment, if required, and without waiving any of the above exceptions, these libelants now here deny all and singular the charges of fraud, collusion, bad faith, false representations and improper conduct upon their part or upon the part of any one acting for or with them, or on their behalf, or on the part of any one else, so far as they are informed, believe and allege.

2. They show to the court that the *Elfrida* was stranded upon a sandy beach, distant about one thousand feet from water of sufficient depth to float her, and that where she lay the water was from about six to eight or nine feet deep, according to the tides, while the vessel drew eleven feet ten inches, or thereabouts, and the draught could not be lessened by discharge of her ballast or otherwise, more than about eighteen or twenty inches, and she was imbedded
19 in the sand to a depth of about two feet, and if high or violent winds had arisen after her second or final stranding (the first having been on a submerged jetty), she would have been either driven further up on shore, or the sand would have drifted and formed about her as she settled and formed a deeper bed, or both would in the course of ordinary experience have occurred.

That the *Elfrida* had ineffectually attempted to get off by the aid of her own anchors, cables and gears, and a tugboat, and had lost at least one anchor and many fathoms of cables, and had badly strained her appliances and was practically helpless so far as said resources were concerned. That she remained in that position for about twelve days, during all of which time her master could, either by wire or letter, have communicated with New Orleans and other places, and have solicited bids or made arrangements for the salvage of the steamer, and could and did during that time, acquaint himself with the nature of the shore upon which she was stranded, and

the likelihood of her becoming practically a total loss, or incurring very great expense in being pulled off, should she settle deeper in the sand, or should it form about her, and should she be driven further or broadside on the beach, all of which libelants allege would reasonably be expected to happen in a gale or stormy weather which frequently came on at that season; such event would have seriously damaged, and perhaps practically destroyed said vessel, and in any case would have rendered her removal from where she lay extremely uncertain and very expensive.

3. Libelants aver that they offered to said master the use of some gear and appliances that they had at or near Velasco shortly after she became beached free of charge save the actual cost, but that the officers and crew of the vessel were unable to move the vessel; and before taking action the captain conferred fully with Lloyd's agent, Mr. James Sorley, who, by reason of such agency, practically represented and acted for the owners and underwriters of the vessel, and also sought information and advice from the pilots at that port and the masters of other vessels and others in no manner concerned with or for libelants, and after careful investigation and inquiry from these and other sources and in the exercise of all due and reasonable diligence and care and after much communication with his owners and instructions from them by cable, the master, using his best judgment, concurred in by disinterested persons familiar with the coast, and by said Lloyd's agent, solicited and accepted libelants' tender, which was the lowest of two that were made, and entered into the contract in question, a substantial copy of which is hereto annexed, marked "A," and made a part of this pleading as fully as if incorporated herein. That the undertaking on the part of libelants was dependant for reward entirely upon their success, and that at the end of twenty-one days if they had failed to float said vessel within that period, they would also have lost all right or claim to compensation. That at great expense they prepared the necessary cables, gear, anchors and other appliances and called into service two lighters and two tugboats, fully manned and equipped. This property, worth about $50,000, was exposed to risk of loss or damage in the Gulf and by contact with the jetties and in the shallow water at and near the *Elfrida*, among the breakers where libelants were obliged to go, and where their boats ran the risk of being stranded and wrecked, and in so doing they encountered personal peril. That by reason of their skill and experience, together with their men and their appliances, they successfully accomplished the undertaking and took off said vessel without any substantial injury, which risk they also assumed; because under the contract, if she had been damaged so as to be of comparatively little or no value, they would have been compelled to accept her at the option of her master in lieu of the monied compensation named in the contract, and their success in saving said vessel uninjured should certainly form no bar to their recovery of the agreed compensation.

4. And they further show that said contract was freely and fairly entered into upon by both sides after several days' deliberation, and

that in no manner was any advantage taken, directly or indirectly, by these libelants, or by any other person acting for or with them, or by any one else to their knowledge, and they distinctly
21 aver that the contentions set out for the first time in said answer were never urged or set up until long after the vessel had been saved. That the master made no pretense of such excuses in avoidance of liability upon the contract, as the answer sets forth, until many weeks after the occurrences in question and after his testimony had been taken at least once; and these libellants say that all such pretexts are wholly unwarranted, unjust and untrue, and they show that in all their dealings with said vessel's master no statement was made by them, or by any one in their behalf, which was not true or believed to be true, and which said master did not have the fullest opportunity of verifying; and that neither they, nor any one else for them, nor any other person so far as they know and believe, ever withheld any information from said master that would have in any manner effected or influenced him, known or unknown, and the facts were that said vessel was in a critical and perilous position, and exposed to the risk of partial or total loss.

5. Libelants further show that the charge that said master was prevented from carrying out the instructions of his owners by reason of the interception of any cablegram or dispatch is an absolutely false statement, recklessly made.

6. Libelants aver that the value of said steamship *Elfrida* was not less than one hundred and ten thousand dollars, and that the contract entered into, in which the compensation was practically contingent on success in getting the vessel off uninjured, was moderate and reasonable, and they fully and fairly performed all its terms and conditions, and incurred great expense and labor in the fulfillment of their agreement.

7. Libelants refer to and adopt all the allegations of the original libel, and they iterate that the pretended defenses of said answer are merely devices upon the part of claimants to obscure the true issue in this case, and to induce the court to annul the contract and award the salvors a diminished and insufficient compensation. And libelants say that in so doing, the claimants are not only guilty of laches in not having done before the contract was made what
22 they are now seeking to do, but are not in good faith in making the general and unjust charges and insinuations set up in their answer; and libelants say that the acts of said master in all respects bound said vessel by reason of the nature and scope of his office as well as the special authority conferred upon him, and that he was not incapacitated by defect of mind, nor prevented by any cause from understanding exactly how matters were, and the probable perils incurred, and the uncertainty of removing the vessel without very great delay and expense, and the full nature and effect of his acts, and claimants should not be permitted now to avoid the consequence of the exercise of his judgment in pursuing what appeared to be the best course to him under all the circum-

stances, and in which judgment he was fully sustained by the facts and past experience.

Wherefore libelants renew the prayers of their original libel, and pray for a decree against said vessel, and against claimants and the sureties upon their claim bond stipulation for release for the sum of twenty-two thousand dollars ($22,000), with legal interest thereon from October 17th, 1894, and all costs, charges and expenses, and that they may have such other, further and general relief as in law and justice they may be entitled to receive.

CHAS. CLARKE,
Of and for Chas. Clarke & Co.

JOS. H. WILSON AND
JAMES B. AND CHARLES J. STUBBS,
Proctors for Libelants.

Subscribed and sworn to by Chas. Clarke & Co. this 21st day of October, A. D. 1895.

CHARLES J. STUBBS,
[SEAL.] *Notary Public in and for Galveston County.*

23 EXHIBIT A.

THE STATE OF TEXAS, }
County of Brazoria. }

This agreement, made and entered into this 15th day of October, 1894, between the steamship *Elfrida*, and the owners thereof, represented herein by B. Burgess, master of said steamship, as party of the first part, and Charles Clarke and Co., of Galveston, Texas, as party of the second part.

Witnesseth, that for and in consideration of the covenants and agreements herein contained on the part of the said party of the first part, to be kept and performed, the said party of the second part hereby agrees and binds himself, his administrators and assigns, to float and place in a safe anchorage, Quintana or Galveston, as directed, the S. S. *Elfrida*, which is now stranded west of and near to the west jetty at the mouth of the Brazos river, in said county and State; to furnish all labor and material at the cost of said party of the second part, and to furnish diver and necessary apparatus to survey or examine the bottom of said steamship, and to complete the same within twenty-one (21) days from date hereof.

The said party of the first part agrees to pay to the said party of the second part for such service, *i. e.*, when he shall have successfully floated said ship, as above set forth, the sum of twenty-two thousand dollars ($22,000). The said party of the first part, however, reserving the right hereby to abandon the ship to and in favor of the said second party in lieu of the amount of $22,000 agreed to be paid as aforesaid.

It is further understood and agreed by and between the parties hereto that a failure to float and place in a position of safety, as above stated, said steamship within the time hereinbefore specified,

to wit, 21 days from date hereof, that said party of the second part shall receive no compensation whatever from said first party for work performed, labor, tools or appliances furnished.

24 Anything that may be discharged to enable vessel to float shall be replaced when she is in a position of safety. It is also agreed and understood that the use of crew and engine shall be at the use and disposal of said party.

Witness the hand of B. Burgess, master of the steamship *Elfrida*, for himself, said ship and the owners, party of the first part, and the hand of Charles Clarke & Co., party of the second part, this fifteenth day of October, 1894.

BENJ. BURGESS.
CHAS. CLARKE — CO.

Witness-:
M. P. MORRISSEY.
J. H. DURKIE,
Master S. S. Lizzie, of Whitby.

(Endorsed:) Contract between Chas. Clarke & Co. and Benjamin Burgess. "Exhibit A." Introduced as evidence by libelants. W. L. Hanscom, com'r U. S. circuit court, E. D. T.

(Endorsements:) "A. D., 672. Chas. Clarke & Co. *vs.* S. S. *Elfrida*, her tackle, &c. Amended and supplemental libel. Filed Oct. 21, 1895. C. Dart, clerk."

25 *Answer of Respondent.*

Filed November 12, 1894.

In the District Court of the United States for the Eastern District of Texas, at Galveston.

CHARLES CLARKE & Co. } In Admiralty.
vs.
STEAMSHIP "ELFRIDA."

To the Honorable David E. Bryant, judge of said district court of the United States in and for the eastern district of Texas:

The answer of Pyman, Bell & Co., owner of steamer *Elfrida*, her tackle, apparel and furniture, in a *course* of salvage, civil and maritime.

Respondent alleges and propounds the following:

That the claimants, being residents of Great Britain, were not present personally to participate in the transaction, matter and things complained of by libelant in libel, and cannot, therefore, answer fully the matters and things thereon complained of, and requires strict proof of all the matters contained in the libel.

PYMAN, BELL & CO.,
By LOCKHART & PAINTER AND
CONVERS & KIRLIN,
Their Proctors.

UNITED STATES OF AMERICA,
Eastern District of Texas.

On this 12th day of November, 1894, before me, W. L. Hanscom, at Galveston, personally appeared the within-named A. E.
26 Painter, and made oath that he is one of the proctors of the respondents in the foregoing libel. That the said claimant is a non-resident and is at present in England, and has not been in Galveston on or since the happening of the matters and things set forth in libelants' libel. And that he has been specially instructed by B. Burgess, the master of said steamship *Elfrida*, as to the truth of the matters stated in the foregoing answers. And that the affiant read the same and knows the contents thereof. And that the matters stated therein are true to *the* best knowledge, information and belief.

A. E. PAINTER.

Subscribed and sworn to before me this 12th day of November, A. D. 1894.

W. L. HANSCOM,
Commissioner U. S. Circuit Court, Eastern District of Texas.

(Endorsements:) A. D., No. 672. Chas. Clarke & Co. *vs.* S. S. *Elfrida*, etc. Answer of respondent. Filed Nov. 12, '94. C. Dart, clerk, by W. L. Hanscom, deputy.

Amended Answer.

Filed December 8, 1894.

To the Honorable David E. Bryant, United States district judge for the eastern district of Texas:

The amended answer of the claimants of the steamship *Elfrida* to the libel of Charles Clarke and Company against the said steamship, her tackle, apparel and furniture, in a cause of contract for salvage, civil and maritime, alleges as follows:

First. They admit that on or about the 15th day of October, 1894, Benjamin Burgess, the master of the steamship *Elfrida*, signed the paper purporting to be an agreement for salvage, which is
27 annexed to the libel, but upon information and belief, except as hereinafter admitted, they deny the other matters alleged in the libel, and require strict proof thereof.

Second. Further answering the said libel, and for a separate defense, the claimants allege that on or about the 5th of October, 1894, whilst the steamer was entering the harbor of Galveston, in charge of a pilot duly licensed under the laws of the State of Texas, the steamer grounded, owing to there being insufficient water on the bar, and that afterwards and on or about the night of the 6th or early morning of the 7th of October, the steamer was borne inside of a submerged jetty a short distance from where she had first stranded, where she lay on a sand bottom, bow on, with stern to the sea, in a position free from substantial danger, until the 24th of

October, 1894, when, by the aid of her own anchors and two anchors furnished by the libelants, and under the power of her own engines and own winches alone, she was hauled over the beach, substantially uninjured, either by the original stranding on the bar or by lying for the period mentioned on the bottom inside the jetty as aforesaid, or in the operation of dragging her into deep water.

The master of the said vessel was wholly unacquainted with the conformation of the bottom at the place of the stranding, and in reporting her position and danger relied chiefly upon information furnished to him by Lloyd's agent at Galveston, and by his own agents, J. Moller & Co., and by the libelants and persons interested with them in obtaining a contract for the salvage of the said steamer. It was reported to the said captain that there were no other salvors or apparatus sufficient to save his vessel, except the libelants and one other firm in Galveston, and that any effort on his part to obtain salvors from New Orleans or elsewhere would only result in larger expense to the steamer, which information the claimants are advised was incorrect and was furnished for the purpose of inducing the captain to employ these libelants.

It was further represented to him by the said persons that the ship was in a position of great danger, which was likely to
28 be aggravated by the formation of sand banks about her, whereas, as your claimants are informed and believe, she was not in any substantial danger, and there was no formation of sand bank or reasonable apprehension of the formation of sand banks of any consequence anywhere about her. The owners of the said vessel were without any information of her position, except such as was conveyed to them by the captain in his cables, which, as aforesaid, were based upon erroneous or fraudulent information furnished to him by persons interested in securing the contract for the libelants for salving said vessel. Upon the faith of the information contained in the said cables, which will be offered in evidence, the claimants, owners of the steamship, being advised that the lowest tender for salving the vessel was £4,580, and supposing that the captain had received tenders made in good faith and free of all collusion between those making the tenders and those upon whom the master was presumably justified in relying for advice, they, on or about the 12th, 13th or 14th of October, authorized the captain to accept the tender of £4,580, "if lower impossible." The said cable, as claimants are informed and believe, was opened by persons in Galveston interested to obtain the contract of salving the vessel for the libelants, and the terms of the said cable were imparted to the libelants before it was delivered to the master, and they allege that before the master received the said cable, he received a telegram from the libelants, reading: "Contract price agreed upon. Will get things ready to start."

When, therefore, the master endeavored, pursuant to his instructions contained in the said cable, to obtain, if possible, lower terms, he was met by refusals to perform the service at all except for the £4,580. The said Burgess thereupon, believing the representations made to him by his agents and by the libelants and by persons in

collusion with them and interested in obtaining the contract for them, signed the said alleged contract annexed to the libel on the 15th of October, 1894.

On the 16th of October the libelants, with a tugboat and certain apparatus belonging to them, and lighters belonging to the
29 other salvors, Brock & Co., of Galveston, who the claimants are informed and believe, were in collusion with the libelants, arrived alongside the *Elfrida*, and on that day laid the steamer's two anchors off astern and on one quarter of the vessel and two of their own anchors off the other quarter and astern, and on the 17th, having connected heavy cables with the said anchors, and having required the steamer to get up full steam on her engines and donkey boilers, they began to heave on the said cables connected with the anchors aforesaid by means of the *Elfrida's* winches, and by their power alone, with the aid of the propeller, the steamer was dragged from her stranded position a distance of upwards of one thousand feet into deep water, during the short period of from about 3.30 to 7 o'clock p. m. of that day.

Third. The claimants thereupon aver that said alleged agreement was made by the said captain without real knowledge either by the owners of the vessel or by himself as to the true situation and danger of the vessel, and, further, that at the time that said alleged agreement was made, it was understood and believed by the said captain that said sand banks were forming, or were likely to form, about the vessel, which rendered her position more dangerous and more difficult of relief, and that it was so understood and believed by the libelants, or, if they did not so understand it and believe it, it was falsely and fraudulently, by them or in their behalf, represented to the said master that they so understood, and thereupon the claimants allege that the said contract was signed either under a mutual mistake of fact or was obtained from the said master by false and fraudulent representations made to him by the libelants or by persons acting in their behalf and for their benefit.

They further allege that the said contract was improvidently made for a highly exorbitant and excessive compensation, and without proper or true understanding or appreciation of the situation and comparative freedom from danger of the vessel, and, furthermore, was obtained from the said master either by the libelants or persons acting in their interest or behalf, taking undue advantage of the distress of the master's situation and of the situa-
30 tion of his vessel, by withholding information from him as to the true position and situation of the vessel and as to other possible means of her relief and by exaggerating to him her danger; and they further allege that said master was prevented from carrying out the instructions of his owners as contained in the cablegrams above quoted, by reason of persons acting for and in behalf of or in collusion with the libelants opening his said cable and communicating the contents thereof to libelants before he had an opportunity of trying to obtain an agreement upon lower terms, thereby baffling and precluding any efforts on his part to carry out the said instructions to obtain lower terms, and that accordingly

the claimants, owners of the said vessel, and the said steamer herself ought not equitably to be bound by the terms of the said agreement.

Fourth. All and singular the premises of this answer are true and within the jurisdiction of this honorable court.

Wherefore claimants pray that the said alleged agreement may be vacated, avoided and set aside, and that this honorable court will be pleased to make such suitable compensation for salvage services as in the circumstances the libelants may be entitled to receive, and your claimants will ever pray, &c.

LOCKHART & PAINTER,
CONVERS & KIRLIN,
Proctors for Claimants.

UNITED STATES OF AMERICA, }
Eastern District of Texas. }

On this 8th day of December, 1894, before me, W. L. Hanscom, a commissioner of U. S. circuit court, E. D. T., personally appeared the within-named Benjamin Burgess, and made oath that he is now and has been during all the time referred to in above answer master of steamship *Elfrida*. That said claimants are non-residents of the United States of America, and are at present in England, and have not been in United States since the happening of the matters and things set forth in libel; that he is familiar with the mat-
31 ters and things set forth in above answer, and that he has read the aforesaid answer, and that affiant has read the foregoing answer and knows the contents thereof, and that the matters and things therein stated are true as stated.

BENJ. BURGESS.

Subscribed and sworn to before me this 8th day of December, 1894.

W. L. HANSCOM,
[SEAL.] *Commissioner U. S. Circuit Court, E. D. T.*

(Endorsements:) A. D., No. 672. United States district court. Charles Clarke *et al.*, libelants, against The Steamship *Elfrida*, her tackle, &c. Pyman, Bell & Co., claimants. Amended answer. Lockhart & Painter, Convers & Kirlin, proctors for claimants, 5 Beekman St., New York, N. Y. Filed Dec. 8, 1894. C. Dart, clerk, by W. L. Hanscom, deputy.

A. D., No. 672.

To the Honorable David E. Bryant, United States district judge for the eastern district of Texas:

The second amended answer of the claimants of the steamship *Elfrida* to the libel of Charles Clarke & Company against the said steamship, her tackle, apparel, and furniture, in a cause of contract for salvage, civil and maritime, alleges as follows:

First. They admit that on or about the 15th day of October, 1894, Benjamin Burgess, the master of the steamship *Elfrida*, signed the

paper purporting to be an agreement for salvage, which is annexed to the libel, but upon information and belief, except as hereinafter admitted, they deny the other matters alleged in the libel and amended libel, and require strict proof thereof.

Second. Further answering the said libel and for a separate defense, the claimants allege that on or about the 5th of October, 1894, whilst the steamer was entering the harbor of Quintana,
32 in charge of a pilot duly licensed under the laws of the State of Texas, the steamer grounded, owing to there being insufficient water on the bar, and that afterwards and on or about the night of the 6th or early morning of the 7th of October, the steamer was borne inside of a submerged jetty a short distance from where she had first stranded, where she lay on a sand bottom, bow on, with stern to the sea, about one thousand feet inside of water sufficient to float her, and about four hundred feet from the beach, in a position free from substantial danger, until the 17th day of October, 1894, when, by the aid of her own anchors furnished by the steamer and two anchors furnished by the libelants, and under power of her own engines and own winches alone, she was hauled over the beach, substantially uninjured, either by the original stranding on the bar or by lying for the period mentioned on the bottom inside the jetty as aforesaid, or in the operation of dragging her into deep water. The weather at and after the stranding and at and after the removal of the ship was moderate and the sea smooth.

The inexperienced master of the said vessel was wholly unacquainted with the conformation of the bottom at the place of the stranding and with the liability of the sands to shift, and in reporting her position and danger relied chiefly upon the information furnished to him by Lloyd's agent at Galveston and by his own agents, J. Moller & Co., and M. P. Morrisey and by the libelants and Brock. It was by them reported to the said captain that there were no others alvors or apparatus sufficient to save his vessel except the libelants and one other firm named Brock & Co., in Galveston, and that any effort on his part to obtain salvors from New Orleans or elsewhere would only result in larger expenses to the steamer, which information, the claimants are advised, was incorrect, and was furnished with the design of inducing the captain to employ these libelants.

It was further represented to him by the said persons that the ship was in a position of great danger, which was likely to be aggravated by the formation of sand banks about her, whereas, as your claimants are informed and believe, she was not in any substantial danger and there was no formation of sand banks or
33 reasonable apprehension of the formation of sand banks of any consequence anywhere about her. The owners of the said vessel were without any information of her position except such as was conveyed to them by the captain in his cables, which, as aforesaid, were based upon erroneous or fraudulent information furnished to him by the persons aforesaid interested in securing the contract to the libelants for the salving of said vessel. Upon the faith of the information contained in the said cables, which will be

offered in evidence, the claimants, owners of the steamship, being advised that the lowest tender for salving the vessel was 4,580 pounds, and, supposing that the captain had received tenders made in good faith and free of all collusion between those making the tenders and those upon whom the master was presumably justified in relying for advice, they, on or about the 12th, 13th or 14th of October, authorized the captain to accept the tender of £4,580, "if lower impossible." The said cable, as claimants are informed and believe, or the substance thereof was imparted to the libelants by some person unknown to the claimants before it was delivered to the master, and they allege that before the master received the said cable, he received a telegram from the libelants, reading: "Contract price agreed upon. Will get things ready to start."

When, therefore, the master endeavored, pursuant to his instructions contained in the said cable, to obtain if possible, lower terms, he was met by refusals from libelants and Brock to perform the service at all, except for the £4,580. The said Burgess thereupon, believing the representations made to him by the persons aforesaid, signed the said alleged contract annexed to the libel on the 15th of October, 1894.

On the 16th day of October, the libelants with a tugboat and certain apparatus belonging to them, and lighters belonging to the other salvors, Brock & Company, of Galveston, who, the claimants are informed and believe, were in collusion with the libelants, and worked with them in performing the services, arrived alongside the *Elfrida*, and on that day laid the steamer's two anchors and cables off astern on one quarter of the vessel and two of their own
34 anchors off the other quarter and astern, and on the 17th, having connected heavy cables with the said anchors, and having required the steamer to get up full steam on her engines and donkey boilers, they began to heave on the said cables connected with the anchors aforesaid by means of the *Elfrida's* winches, and by their power alone, with the aid of the propeller, the steamer was dragged from her stranded position a distance of upwards of one thousand feet into deep water, during the short period of from about 3.30 to 7 o'clock p. m. of that day. It was not provided in the said contract that the salvors were to have the use of the steamer's winches, but only of the engines, meaning thereby the use of her propeller.

Third. The claimants thereupon aver that said alleged agreement was made by the said captain without real knowledge, either by the owners of the vessel or by himself, as to the true situation and danger of the vessel; and further, that at the time that the said alleged agreement was made, it was understood and believed by the said captain that sand banks were forming or were likely to form about the vessel, which would render her position more dangerous and more difficult to relieve, and that it was so understood and believed by the libelants; or, if they did not so understand it and believe it, it was falsely and fraudulently by them, or in their behalf by the persons aforesaid, represented to the said master that they so understood, and thereupon the claimants allege that the said contract was

signed, either under mutual mistake of fact, or was obtained from the said master by erroneous or fraudulent representations made to him by the libelants or by the aforesaid persons acting in their behalf and for their benefit, with the design of obtaining the contract for libelants.

Fourth. They further allege that the said contract was improvidently made for a highly exorbitant and excessive compensation, and without a proper or true understanding or appreciation of the situation and comparative freedom from danger of the vessel, and furthermore, was obtained from the said master either by the
35 libelants or the persons aforesaid, acting in their interest or behalf, taking undue advantage of the distress of his situation and of the position of his vessel, by exaggerating to the master the danger and peril of his vessel's position, and by Clarke and Brock agreeing collusively not to bid against each other, but to permit Clarke to obtain the contract at his figure, and then divide the work and compensation, and by the final refusal of Clarke and Brock to undertake the service at all except for 4,580 pounds sterling, and Clarke's threat to exact larger compensation unless terms were promptly agreed, and by all the persons aforesaid advising the master there was no other means of saving the vessel but by employing Clarke or Brock, which the claimants are advised and believe was not the real fact; and they further allege that the said master was prevented from carrying out the instructions of his owners as contained in the cablegram above quoted, and by the act of persons unknown to the claimants apparently acting for and in behalf of or in collusion with the libelants before he had an opportunity of trying to obtain an agreement upon lower terms, thereby baffling and precluding any efforts on his part to carry out the said instructions to obtain lower terms, and that accordingly the claimants, owners of the said vessel, and the said steamer herself, ought not equitably to be bound by the terms of the said agreement.

Fifth. All and singular the premises of this answer are true and within the jurisdiction of this honorable court.

Wherefore claimants pray that the said alleged agreement may be vacated, avoided and set aside, and that this honorable court will be pleased to make such suitable compensation for salvage services as *in* the circumstances the libelants may be entitled to receive, and your claimants will ever pray, &c.

WM. B. LOCKHART,
CONVERS & KIRLIN,
Proctors for Claimants.

36 EASTERN DISTRICT OF TEXAS, *ss:*

Wm. B. Lockhart, being duly sworn, says that he is one of the claimants' proctors, and that the foregoing amended answer is true according to his information and belief. He further says that the reason why these amendments are not verified by one of the claimants is that said claimants reside in England and are absent from this district.

WM. B. LOCKHART.

Sworn to this 23d day of October, 1895.

C. DART,
Clerk U. S. Dist. Court, Eastern District of Texas,
at Galveston,
[SEAL.] By W. L. HANSCOM, *Deputy.*

(Endorsements:) "A. D., No. 672. Chas. Clarke & Co. *vs.* Steamship *Elfrida.* Amended answer to amended libel. Filed Oct. 23, 1895. C. Dart, clerk, by W. L. Hanscom, deputy."

Claim of Pyman, Bell & Co.

Filed October 26, 1894.

In U. S. District Court, Eastern District of Texas, at Galveston, Texas.

CHARLES CLARKE & Co.
vs.
STEAMSHIP "ELFRIDA," HER TACKLE, APPAREL, AND FURNITURE. } No. 672. Admiralty.

B. Burgess, being duly sworn, on oath deposes and says that Pyman, Bell & Co., of Newcastle, England, are the true and
37 *bona fide* owners of the said steamship *Elfrida*, her engines, tackle, apparel and furniture, and no other person is the owner thereof

That the affiant is the master of said steamship *Elfrida* and at the time of arrest was in the possession thereof, and that he is the lawful bailee thereof and for the owners authorized to make this affidavit and claim.

BENJAMIN BURGESS, *Master.*

Subscribed and sworn to before me this 26th day of October, A. D. 1894.

C. DART,
Clerk U. S. District Court, Eastern Dist. of Texas,
at Galveston.
[SEAL.] By W. L. HANSCOM, *Deputy.*

(Endorsements:) No. 672, A. D. Charles Clarke & Co. *vs.* S. S. *Elfrida*, etc. Claim of Pyman, Bell & Co. Filed Oct. 26, 1894. C. Dart, clerk, by W. L. Hanscom, dep't.

EXHIBIT "A."

Contract Between Chas. Clarke & Co. and Benj. Burgess.

THE STATE OF TEXAS, }
County of Brazoria. }

This agreement, made and entered into this 15th day of October, 1894, between the steamship *Elfrida*, and the owners thereof repre-

sented herein by B. Burgess, master of said steamship, as party of the first part, and Charles Clarke and Co., of Galveston, Texas, as party of the second part.

Witnesseth, that for and in consideration of the covenants and agreements herein contained on the part of the said party of the first part, to be kept and performed, the said party of the second part hereby agrees and binds himself, his administrators and assigns, to float, and place in a safe anchorage, Quintana, or
38 Galveston, as directed, the S. S. *Elfrida* which is now stranded west of, and near to the west jetty at the mouth of the Brazos river, in said county and State, to furnish all labor and material at the cost of said party of the second part, and to furnish diver and necessary apparatus to survey or examine the bottom of said steamship and to complete the same within twenty-one (21) days from date hereof.

The said party of the first part agrees to pay to the said party of the second part, for such services, *i. e.*, when he shall have successfully floated said ship, as above set forth, the sum of twenty-two thousand dollars ($22,000.00). The said party of the first part, however, reserving the right, hereby, to abandon the ship to and in favor of the said second party, in lieu of the said amount of $22,000.00 agreed to be paid as aforesaid.

It is further understood and agreed by and between the parties hereto, that a failure to float and place in a position of safety as above stated, said steamship within the time hereinbefore specified, to wit, 21 days from date hereof, that said party of the second part shall receive no compensation whatever from said first party, for work performed, labor, tools or appliances furnished.

Anything that may be discharged to enable vessel to float shall be replaced when she is in a position of safety. It is also agreed and understood that the use of crew and engine shall be at the use and disposal of said party.

Witness the hand of B. Burgess, master of the steamship *Elfrida*, for himself, said ship, and the owners, party of the first part, and the hand of Charles Clarke & Co, party of the second part, this fifteenth day of October, 1894.

BENJ. BURGESS.
CHARLES CLARKE & CO.

Witness-:
M. P. MORRISSEY.
J. H. DURKIE,
Master S. S. Lizzie, of Whitby.

(Endorsed:) A. D., 672. Contract between Chas. Clarke & Co. and Benj. Burgess. Exhibit "A." Introduced as evidence by libelants. W. L. Hanscom, com'r U. S. circuit court, E. D. T.

39 *Letter from B. Burgess, Master, &c., to Chas. Clark.*

The Hotel Velasco—B. Lindemuth, manager.

VELASCO, TEXAS, *Oct. 9th*, 1894.

Re S. S. *Elfrida.*

Capt. Chas. Clark.

D'R SIR: Please tender for to float and place in a place of safety, say *Galveston*, where her bottom can be examined. Furnishing diver and his apparatus, also to furnish all material and labour in floating said S. S. *Elfrida* also time required, reply at your earliest convenience under seal to James Sorley, Lloyd's agent, or myself. No cure no pay.

Yours truly, B. BURGESS, *Master*

P. S.—A convenient time to be allowed to get the ship off, and if at the expiration of the time the vessel is still aground, all claims on this contract to *cease* and to be *nul- & void.*

B. BURGESS, *Master.*

Deposition of Benj. Burgess, Taken before W. L. Hanscom, Com'r U. S. Circuit Court, E. D. T., at Galveston, Texas, October 27, 1894.

EXHIBIT A.

THE STATE OF TEXAS, }
County of Brazoria. }

This agreement, made and entered into this 15th day of October, 1894, between the steamship *Elfrida* and the owners thereof,
40 represented herein by B. Burgess, master of said steamship, as party of the first part, and Charles Clarke & Co., of Galveston, Texas, as party of the second part.

Witnesseth, that for and in consideration of the covenants and agreements herein contained on the part of the said party of the first part, to be kept and performed, the said party of the second part hereby agrees and binds himself, his administrators and assigns, to float and place in a safe anchorage, Quintana or Galveston, as directed, the S. S. *Elfrida*, which is now stranded west of and near to the west jetty at the mouth of the Brazos river, in said county and State, to furnish all labor and material at the cost of said party of the second part, and to furnish diver and necessary apparatus to survey or examine the bottom of said steamship, and to complete the same within twenty-one (21) days from date hereof.

The said party of the first part agrees to pay to the said party of the second part, for such services, *i. e.*, when he shall have successfully floated said ship, as above set forth, the sum of twenty-two thousand dollars ($22,000.00). The said party of the first part, however, reserving the right, hereby, to abandon the ship to and in favor of the said second party, in lieu of the said amount of $22,000.00 agreed to be paid as aforesaid.

It is further understood and agreed by and between the parties hereto, that a failure to float and place in a position of safety, as above stated, said steamship within the time hereinbefore specified, to wit: 21 days from date hereof; that said party of the second part shall receive no compensation whatever from said first party for work performed, labour, tools or appliances furnished.

Anything that may be discharged to enable vessel to float, shall be replaced when she is in a position of safety. It is also agreed and understood that the use of crew and engine shall be at the use and disposal of said party.

Witness the hand of B. Burgess, master of the steamship *Elfrida*, for himself, said ship, and the owners, party of the first part,
41 and the hand of Charles Clarke & Co., party of the second part, this fifteenth day of October, 1894.

BENJ. BURGESS.
CHAS. CLARKE — CO.

Witness-:
M. P. MORRISSEY.
J. H. DURKIE,
Master S. S. Lizzie, of Whitby.

(Endorsed:) Contract between Chas. Clarke & Co. and Benjamin Burgess. "Exhibit A." Introduced as evidence by libelants. W. L. Hanscom, com'r U. S. circuit court, E. D. T.

(A true copy.)
Attest: W. L. HANSCOM,
[SEAL.] *Com'r U. S. C. C., E. D. T.*

United States District Court, Eastern District of Texas, at Galveston.

CHARLES CLARKE & Co.
vs.
STEAMSHIP "ELFRIDA," &C. } A. D., No. 672.

Hearing before W. L. Hanscom, U. S. commissioner, Saturday, October 27, 1894.

BENJAMIN BURGESS, a witness on behalf of the libelant, being duly sworn, testified as follows:

Examined by Mr. WILSON, proctor for libelants:

Q. Captain, what was your employment on or about the 15th of October?

A. Master of the *Elfrida*.

Q. Where was she lying?

A. On the beach west of the Brazos river.

42 Q. How did she come to be lying there, Captain?

A. The vessel struck the bar on entering, and on account of the high seas she drifted over the breakwater on to the beach.

Q. What breakwater was that, Captain?

A. The breakwater erected at the mouth of the Brazos river.
Q. What point of the compass was that breakwater erected at?
A. The submerged end, the extreme end.
Q. Was that west, north, east, or south?
A. The southeast.
Q. What was the condition of the vessel after she struck? Were you able to sail her after she struck; could you yourself get her off?
A. I could have gotten her off if I had the tackle.
Q. What did you do; did you enter into a contract with any person to get her off? Just state yourself what you—what steps and so forth, in your own language.
A. The first place she struck the bar, on account of the strong current running to the westward, her head paid off to the westward, grounding on the submerged part of the west jetties.

By Mr. PAINTER: I object to the witness answering the question in *the* form, as it does not confine him to the issues in this case.

By Mr. PAINTER: The complainant objects to any further evidence in the case at this time, before the complainant, Captain Clarke, has made a public declaration in this case that he has employed no counsel in the case, and no one is authorized to appear.

Mr. Clarke withdraws the remarks he made about not employing counsel, and the case will be proceeded with.

Q. Now, Captain, did you or not, on or about the 15th of October, enter into a contract with Charles Clarke & Co., of Galveston, to float the steamship *Elfrida?*
A. ——.

(The claimant objects to the question; it does not show that the captain had any authority to make any contract.)

Q. Captain Burgess, were you or not authorized by the owners of the *Elfrida* to enter into a contract to take that vessel out of the position you have described her to be in?

43 Objections to the question by claimant, as it would be improper to prove authority of an agent; irrelevant and immaterial.

Q. Did you receive any authority, and if so whether in writing or verbal, from the owners of the vessel, in *his* capacity as master, to act as agent to float that vessel, the *Elfrida?*

Objections by Mr. Painter as an improper mode to prove authority.

A. I did not receive any authority to act as agent.
Q. Did you or not receive any authority to represent the owners in floating the vessel, in any capacity?

Objection by Mr. Painter, being irrelevant and immaterial, and for the further reason not proper mode to prove the authority of an agent.

A. I received a cable to do the best I could.
Q. The best you could about what?

A. The best I could to get her afloat, and consult Lloyd's agent, Mr. James Sorley.

Q. Did you obey those instructions?

Objected to as being leading and suggesting the answer, by Mr. Painter.

Q. What action did you take on those instructions?

A. I consulted Lloyd's agent.

Q. What did you do further?

A. I sent for him to come to Velasco. I did nothing further than consult him.

Q. Did you get the vessel off?

A. No.

Q. Did you or not make a contract with Charles Clarke & Co. of Galveston to float the vessel, *Elfrida*, on the 15th of October, 1894?

A. Yes.

The libelant offers in evidence contract between Chas. Clarke & Co. and Benjamin Burgess, acting for the owners of the steamship *Elfrida*, made, executed and delivered at Velasco, Brazoria county, Texas, by and between said parties.

44 Q. Is that the contract you entered into, and is that your signature at the bottom of that paper?

A. (Referring to paper.) Yes, sir.

Said contract referred to marked "Exhibit A."

Q. Captain, by what authority did you enter into this contract with Chas. Clarke & Co.?

Mr. Painter objects to the question as being irrelevant and immaterial.

Q. By what authority did you enter into this contract with Chas. Clarke & Co. to take this vessel off?

A. By cable.

Q. Have you got that cable in your possession?

A. Not now.

Mr. Wilson asks that the cable be produced.

Mr. Painter objects to the introduction of the cable and the request that the cable be introduced, for the reasons that the same is not proper evidence, not primary evidence.

Mr. PAINTER: I object to any demand of this kind, as there has been no supbœna for the witness.

Counsel for libelant asks for a *subpœna duces tecum* to be served on the captain asking him to produce the cable as evidence, and such other written authority as he may have received from the owners of the said steamship authorizing him to float said steamship and enter into a contract for the floating of said steamship, said papers bearing date between the 1st and 20th of October, 1894.

A. The papers referred to are now at Velasco, but I will forward them to the commissioner taking this testimony that they may be returned with my testimony and properly marked for identification.

Q. Captain, you say that you received a cable to enter into this contract; is that correct?

A. I received a cable to accept the lowest tender.

Q. Who made the lowest tender, Captain?

A. Chas. Clarke & Co.

45 Q. How much lower was he, Captain, than the other tenders, if any others were made?

Defendant objects as being irrelevant and immaterial.

Q. Captain, did you accept the lowest tender?

Mr. Painter objects, as it is irrelevant and immaterial.

A. Yes.

Q. What was the amount?

A. $22,000.

Q. That was the tender of Chas. Clarke & Co.?

A. Yes.

Q. Who are the owners of this vessel, Captain?

A. Pyman, Bell & Co., Keyside, Newcastle, England.

Q. Did you report the lowest bid you received to them?

The claimant objects to the question as being irrelevant and immaterial, and not one of the issues in this case.

A. Yes.

Q. Did they authorize you to accept it?

Mr. Painter objects as being irrelevant and immaterial and not best evidence.

Q. Captain, you said the lowest bid was Chas. Clarke & Co., and that you were authorized to accept the lowest bid, and that you reported the lowest bid to the owners, being the bid of Chas. Clarke & Co., and that you entered into a contract with them to float the vessel. Now, I ask you whether you reported all those facts to the owners?

Objections by claimant as being leading, irrelevant.

Q. Did you or not report those facts to the owners, and if they responded, what was the response?

Objections by claimant, as not being best evidence.

A. I did. They cabled to accept the lowest tender.

Q. Captain, you say that you entered into a contract then,

46 being duly authorized, with Chas. Clarke & Co. of Galveston, to float the *Elfrida*, and that the contract in evidence which you have read is the contract you entered into? Did or did not Chas. Clarke & Co. carry out the terms and conditions of that contract in good faith, as far as their part was concerned?

Objection by claimant as before.

A. That was the contract I signed; but there is one clause in that *question* which is not yet complete.

Q. What is that clause, Captain?

A. They agreed that after the vessel was floated that in case she was not worth the amount of salvage, the salvors were to accept the ship in lieu of salvage. After the vessel was floated the underwriters of America refused to accept the ship until dry-docked.

Q. Have you as the representative of the owners, master of the vessel, or in your capacity of representative of the owners of said steamship, tendered the steamship *Elfrida* to Chas. Clarke & Co., the libelants in this case and the contractors to float said vessel?

Objections by claimant as being irrelevant and immaterial.

A. No; I have not.

BENJAMIN BURGESS.

Testimony Taken at Hearing.

It is agreed by and between the parties that the exceptions filed by the libelant to the claimant's amended answer may be considered as exceptions to the second amended answer, so far as applicable, except as hereinafter waived.

Counsel for plaintiff offered in evidence the contract between the master of the S. S. *Elfrida*, B. Burgess, and Charles Clarke & Co., the salvors, to which counsel for defendant objected for reasons stated in his amended answer, the court reserving its ruling.

The contract is here inserted as Exhibit A.

47 EXHIBIT A.

STATE OF TEXAS, }
County of Brazoria. }

This agreement, made and entered into this 15 day of October, 1894, between the steamship *Elfrida* and the owners thereof, represented herein by B. Burgess, master of said steamship, as party of the first part, and Charles Clarke and Company, of Galveston, Texas, party of the second part,

Witnesseth, that for and in consideration of the covenants and agreements herein contained on the part of the said party of the first part to be kept and performed, the said party of the second part hereby agrees and binds himself, his administrators and assigns, to float and place in a safe anchorage, Quintana or Galveston, the said steamship *Elfrida*, which is now stranded west of, and near to, the west jetty, at the mouth of the Brazos river, in said county and State, and furnish all labor and material, at the cost of said party of the second part, and to furnish diver and necessary apparatus to survey or examine the bottom of said steamship, and to complete the same within twenty-one days from date hereof.

Said party of the first part agrees to pay said party of the second part, for such service, *i. e.*, when he shall have successfully floated said ship, as above set forth, the sum of twenty-two thousand dollars ($22,000). The said party of the first part, however, reserving the right hereby to abandon the ship to and in favor of the said party

of the second part, in lieu of the said twenty-two thousand dollars, agreed to be paid as aforesaid.

It is further understood and agreed by and between the parties hereto, that should he fail to float and place in a position of safety, as above stated, said steamship, within the time hereinbefore specified, to wit, 21 days from date hereof, that said party of the second part shall receive no compensation whatever from said first party, for work performed, labor, tools or appliances furnished.

Anything that may be discharged to enable the vessel to
48 float shall be replaced when she is in a position of safety. It is also agreed and understood that the use of crew and engine shall be at the use and disposal of said party.

Witness the hand of B. Burgess, master of the S. S. *Elfrida*, for himself, said ship and the owners, party of the first part, and the hand of Chas. Clarke & Co., party of the second part, this 15th day of October, 1894.

BENJ. BURGESS.
CHAS. CLARKE.

Witnesses:
M. P. MORRISSEY.
J. H. DURKIE.
Master of S. S. Lizzie, of Whitby.

Capt. CHAS. CLARKE, plaintiff, sworn.

Direct examination by Mr. STUBBS:

Q. You identify that as the contract between Chas. Clarke & Co. and Benj. Burgess?
A. Yes, sir.
Q. Were all the facts stated in that contract?
A. Yes, sir.
Q. Were you a member of the firm of Chas. Clarke & Company, who signed this contract?
A. Yes, sir; I signed that contract.
Q. Where was it signed?
A. It was signed in Velasco, on the 15th day of October. I got a letter from the captain on the 9th of October.
Q. Addressed to you?
A. Yes.
Q. Where were you at that time?
A. At Velasco. It was handed to me in person. Mr. Sorley and the captain were together.
Q. Requesting tender from you?
A. Yes, sir; that is the tender, sir.

Counsel for plaintiff offered letter in evidence, to form a part of this record as Exhibit B.

EXHIBIT B.

"VELASCO, *Oct.* 9, 1894.

Capt. Chas. Clarke, *re* S. S. *Elfrida.*

DEAR SIR: Please tender for to float and place in a place of
49 safety, say Galveston, where her bottom can be examined, furnishing diver and his apparatus. Also to furnish all material and labor in floating said steamship *Elfrida*, also time required. Reply at your earliest convenience under seal to Jas. Sorley, Lloyd's agent, or myself.

No cure, no pay.

Yours truly, By B. BURGESS, *Master.*

P. S.—A convenient time to be laid to get the ship off, and if at the expiration of the time the vessel is still aground, all claim on this contract to cease and to be null and void.

B. BURGESS, *Master.*"

Q. In reply to this letter you submitted tender?
A. Yes, sir.
Q. On the 9th of October?
A. Yes, sir.
Q. Offering to perform the service for the sum of $22,000?
A. Yes, sir.
Q. Did you submit the tender in writing?
A. Yes, sir.
Q. Have you a copy of it?
A. The captain has it, or Mr. Sorley has it.
Q. You applied to the master?
A. Yes, sir; and Mr. Sorley, together. They were at Velasco, on the 9th, together.
Q. Was any action taken at that time?
A. Not for seven or eight days afterwards. They said they were wiring London and the owners of the ship for authority.

Mr. KIRLIN: I object to what Sorley stated.

Q. Please state what you did in pursuance to this signed contract; did you perform the contract?
A. Yes, sir.
Q. Please state what you did in regard to taking the vessel off from her stranded position—state whether or not you took her off.
A. Yes, I took her off.
Q. Please state where you took her.
A. Into Quintana.
Q. Will you please state whether or not that is a place of anchorage?
A. That is the place the master wanted her. I wanted to go to Galveston, and he said they would take her into Quintana, as
50 they wanted to load there, and he did not think there was much damage to the vessel and that he could load her there.

Q. Did you furnish labor and material?
A. Yes, sir.
Q. With regard to diver and necessary apparatus to examine bottom of the vessel?
A. I complied with the contract in all its parts.
Q. Has this contract been discharged by payment of the money or surrender of the vessel?
A. No, sir. I asked the captain about it, and told him I wanted my money for getting the vessel off, and he told me he would go up and wire the owners and insurance agents at London and Newcastle, and he did so. That was on the 18th, and the next day he wired back——

Mr. Kirlin objects to substance of documents being stated by witnesses; that the documents themselves would be the best evidence. Sustained by the court.

Q. You performed the contract?
A. Yes, sir.
Q. Within what time?
A. It was a week from the day we started.
Q. Within the twenty-one days?
A. Yes, sir.
Q. What action did they take under this contract, with respect to paying you, or settling the contract, the owners or master of the vessel?

Counsel for defendant admits that they did not pay the money.

Q. What steps did you take then when they refused?
A. I had the vessel seized.

Cross-examination by Mr. KIRLIN:

Q. You were in Velasco October 9th?
A. Yes, sir.
Q. When did you return to Galveston?
A. I returned to Galveston on the 10th.
Q. When were you next in Velasco?
A. I was next in Velasco on the 15th; I arrived in Quintana on the 14th and Velasco on the 15th.
Q. Do you mean to testify that this is the tender upon which the other agreement was finally drawn?
A. That is the tender that the offer was based upon.
51 Q. Any other negotiations?
A. No, sir; I never spoke to the captain after he gave me that tender till the night of the 14th.
Q. Any communications between you and the captain and Moller?
A. No, sir; never seen Moller. I was not at Galveston, but in Sabine Pass.
Q. Who else belongs to your firm?
A. My partner, Mr. Robert Clarke.

Q. Where was he?
A. Sabine Pass.
Q. Did you and Robert Clarke compose the firm of Clarke & Co.?
A. Yes, sir.
Q. Who is Mr. Charles Clarke, Jr.?
A. He is my son.
Q. Was he attending to your business here while you were at Sabine Pass?
A. Yes, sir; if there was any to attend to.
Q. How did you learn that Captain Burgess was willing to accept your tender?
A. Mr. Moller told us that our tender was accepted, and both him and Mr. Sorley told me my tender was accepted, and to get ready and go and do the work.
Q. What day was that?
A. The 14th.
Q. Did they show you any letters or telegram?
A. Mr. Moller had a telegram in his hand.
Q. Did you see it?
A. Just see the telegram in his hand when he lold me my bid was accepted.
Q. Who was it from?
A. From Burgess.
Q. Are you sure?
A. Yes, sir.
Q. What did it say?
A. It says: "Clark's bid accepted."
Q. How did you go to Velasco?
A. I had to get all my things ready to go down there; had to get tugboat, two schooners and everything ready on the 15th. It took me all of a day to get ready, and during that time I seen telegram from Burgess, saying, "If Clark not ready hire somebody else at same price."
Q. Are you sure it said at same price?
A. Yes, sir; I seen the telegram, and I told Mr. Moller I had all my fleet. It was some seven or eight days from the time that tender was given me, and I had all my fleet at Sabine Pass and it took me some time to get ready.
52 Q. When did you get there?
A. Sunday afternoon, on the 14th inst.
Q. I thought you said you did not know it was accepted till the 14th?
A. It was accepted on the 14th, and I got away the same day.
Q. How early in the morning did you learn it was accepted?
A. I think it was in the afternoon I heard it was accepted.
Q. Or possibly on the morning of the 13th?
A. Yes; I think it was; I am not certain.
Q. Have you those dates very well in mind, Captain?
A. I know the date of the signing of the contract was on the 15th, at Velasco.

Q. Are you sure that you got ready and started away on the same day you received acceptance of your tender?
A. No, sir; the next day.
Q. How far back was it that you began to get ready?
A. I think it was on the 14th I got ready.
Q. You got away what time on that day?
A. At noon.
Q. Was it not earlier than the afternoon of the 13th that you learned from Moller that your offer had been accepted?
A. It was on the evening of the 13th, about 6 o'clock.
Q. Did you send any telegram to Captain Burgess then?
A. Yes, as soon as I seen Moller's telegram, I wired the captain myself. I think it was somewhere near 6 o'clock in the afternoon I telegraphed the captain I was getting ready.
Q. Did you go down with your fleet?
A. Yes, sir.
Q. What did you take with you?
A. A tugboat and a schooner.
Q. The *Seminole?*
A. No; the *Josephine.* I had ordered the *Seminole* from Sabine Pass by telegram.
Q. What schooner?
A. *Louis Dolson.*
Q. Was that your schooner?
A. It was one I hired.
Q. Whose was it?
A. John Anderson's.
Q. What did you take along with it?
A. Anderson's chains, hawsers and men.
Q. How many men?
53 A. We had about 12 men, whom we took down there on the schooner, and the men belonging to the schooner.
Q. How many, all told, from Galveston?
A. About 15 or 16 from Galveston.
Q. Is that inclusive of the persons who were on the tugboat?
A. Not counting them at all; they belonged to the tugboat.
Q. You got there what day?
A. On the 14th.
Q. At Velasco?
A. Yes, sir.
Q. You said you left here on the afternoon of the 14th?
A. I arrived there on the 15th.
Q. What time?
A. I do not know exactly what time.
Q. In the morning?
A. No, sir; it was in the evening.
Q. Where did you find Captain Burgess?
A. Velasco.
Q. Had you this contract drawn up at this time?
A. No, sir; he drew that up himself. I had one drawn up my

self for him to sign. It was drawn up here in Galveston, but he would not have it, because he wanted the ship off in 21 days.

Q. Who drew up your contract?

A. Mr. Sorley and myself. Mr. Sorley approved my contract as an insurance agent.

Q. Did you say Captain Burgess drew up this one?

A. No, sir; it was drawn up before I got there; it was waiting for me.

Q. You do not really know who drew it up?

A. No, sir; I know I signed it with Captain Burgess. He was there and had it in his hand, and I asked him how it was he would not accept my contract, and he said he wanted the 21-day clause put in, so if I did not get the ship off in that time he could contract with some one else.

Q. Do you remember the time of the day it was signed on the 15th?

A. In the evening, I think.

Q. What steps did you take then?

A. I strapped the vessel, and took her yards down. The sea was high, and I could not lay the anchors that day. There was a high sea, and we had to wait till the morning of the 16th to lay anchors.

Q. Did you lay anchors from the schooner?

A. I hired a barge there; it was too risky to put it in the schooner. I hired a barge there from Brock.

54 Q. Who was he?

A. He was working there as a stevedore, and was working on the steamship when I was there.

Q. Did he run anchors when you got there?

A. Yes, sir; he had a gang of men there.

Q. That was on the 9th?

A. Ninth or tenth; I know it was the 8th or 9th they were working.

Q. You and Brock were rivals in this port in the business of salvors?

A. He was there, trying to get the vessel off, working with the captain.

Q. Is it not a fact that Brock and yourself have the chief business here as salvors?

A. No, sir; there are several others. There is the Galveston Lighter Co. Brock was a partner of ours and we had a falling out, and he went to Velasco.

Q. His headquarters was at Velasco?

A. Yes.

Q. When did you hire the lighter from Brock?

A. It was the day I arrived there—the 14th, I think—before the contract was signed.

Q. You hired the lighter from Brock before the contract was signed?

A. Not before the contract was signed; I asked him if I could get a lighter.

Q. You saw Brock about the lighter before the contract was signed?

A. No, sir; I did not see him before the contract was signed about the lighter.

Q. What did you see him about?

A. When the contract was signed I had these schooners, and when I found out I had to get barges to lay my anchors I went to Mr. Lee, who is in charge of the work of the Velasco Company there, and I asked him if I could get one of his barges to lay anchors.

Q. What time of day was that?

A. In the night-time, after we had signed the contract on the 15th.

Q. You knew when you got there you needed something to put down the anchors with?

A. No, sir; I thought I could make the schooners do if the weather was good.

Q. And when you found the weather was bad you knew you needed a lighter?

A. Yes, sir.

Q. You set out at once to get a lighter and you saw Brock?

A. No, sir; I saw Mr. Lee, and he told me he had turned it over to Brock.

55 Q. Then you saw Brock?

A. Yes, sir; that was on the 15th.

Q. You arranged to get a lighter from him?

A. Yes, sir. He was working some men loading a ship down there, and he told me I could have the lighter and what men I needed, and his assistance, too, if I needed it.

Q. Did you take it?

A. Yes, I took all the men I could get.

Q. You did not take the lighter, too?

A. Yes, from Brock and the company together.

Q. How many of Brock's men did you have?

A. Eight of his men.

Q. What did they do?

A. They worked on the lighters and got chains and anchors ready to lay.

Q. Did you engage Brock also to assist in this work?

A. Yes. I told him I would pay him for his assistance.

Q. Any terms agreed upon between you and Brock?

A. None, except about the lighter. It was a new lighter he had just bought, and he says, "If you take that lighter and lose her, you will have to pay me what she cost, or give me one like her." I says, "How does she stand?" He says she cost about $5,000, and hawser and engine about $6,500 altogether, and I told him if I lost his lighter I would either give him a new lighter or pay him $6,500, and he says, "All right, you can take her."

Q. Then the gear was transferred from your schooner to Brock's lighter and the company's lighter?

A. Some on Brock's lighter and some on the company's lighter.

Q. Did you take charge of one?
A. I was on the lighter till the anchors was laid.
Q. Where was Brock?
A. On the ship.
Q. Was he there on the 16th with his men working on the vessel?
A. Yes, sir; on the 16th and 17th.
Q. He was on the ship at the time she was floated?
A. Yes, sir; all of us at the time she was floated.
Q. Were you on?
A. Yes, sir; I was on when she was floated, and we brought her into Quintana in the morning.
Q. How many anchors of yours did you put down? Were the anchors all her own?
A. We had more there.
56 Q. Why did you not put down your own anchors instead of the ship's anchors?
A. Because the weather looked moderate, and I thought that would hold her. Our anchors were larger than the ship's anchors, and I thought with the four anchors I had enough to hold her.
Q. How many of your own did you put down?
A. Two.
Q. The other two were the ship's?
A. Yes.
Q. Two bow anchors?
A. Yes, sir.
Q. Was there any provision in the contract that you should have the use of the ship's anchors?
A. Yes, everything. I used those to lighten her up. When I took the anchors off the bow and the chains off the bow, that lightened her up. I had permission to use her anchors, steam and everything.
Q. Who did you ask for the anchors?
A. The captain.
Q. It was not far from where they hung, down to the sand?
A. It was a good deal of trouble to get away from the bow of the ship.
Q. How much did those anchors weigh?
A. About three thousand pounds apiece.
Q. What did yours weigh?
A. About seven thousand pounds apiece.
Q. And you had yours on one quarter and hers on another?
A. Our two anchors was on the east quarter.
Q. And the ship's two on the west quarter?
A. On the south quarter.
Q. Are yours patent anchors or with stock?
A. One was patent and one was stock.
Q. The ship's were stock?
A. Patent anchors.
Q. Weren't they big stock anchors?
A. No, sir.
Q. Are you certain?

A. Yes, sir.
Q. Did you use the ship's cables?
A. And other cables; yes, sir.
Q. Made your hawsers fast to the end of them?
A. Yes, sir.
Q. And those you carried to the winches?
A. Yes, sir.
Q. One from one quarter of it and one from the other?
A. Two from each quarter; two from the south quarter, one on the east quarter and one leading forward.
Q. Speaking of the ropes you carried to the winches, how many?
A. Four hawsers to the winch
57 Q. Two aft and two forward?
A. Three aft and one forward.
Q. What size hawsers?
A. Twelve-inch hawsers, one nine and two eight.
Q. Did you carry them from the lighter two and around the winch or attach the gear to them?
A. The smallest one we did, and the biggest one we rove off to the large blocks and falls.
Q. On which side?
A. On the east side—the starboard quarter.
Q. You had blocks and falls to your cables?
A. Yes, sir.
Q. On the other side you had to carry the cables straight to the winch?
A. Yes, sir.
Q. Have any blocks and falls to run to the edge leading forward to the winch?
A. No, sir.
Q. Which side was that?
A. Larger hawser on the starboard side.
Q. The one forward?
A. That was on the starboard side.
Q. How long were you laying those cables?
A. We were all one day till about four o'clock in the afternoon.
Q. That was on the 16th?
A. Yes, sir.
Q. How much of the 17th?
A. Part of the 17th; on that day we commenced to heave her off.
Q. Were you aboard when they began to heave?
A. Yes, sir.
Q. You superintended the operation of heaving?
A. Yes, sir.
Q. That was done on the steamer's winch?
A. Yes, sir.
Q. Your own boat did not do any pulling?
A. Yes, sir; she did; she pulled off; we had her pretty well off.
Q. When you started her, it was done with the winches alone?
A. Yes, sir.
Q. And the propeller?

A. The propeller done some of it. They had been working the propeller several times before, but she was sanded and could not do much.

Q. The propeller was used?

A. Yes, sir; she was to use her own steam.

58 Q. How far did you pull her before you did any pulling with your own tugboat?

A. About twelve hundred feet.

Q. She was substantially off when you took hold of her with the tugboat?

A. No, sir; she was on the jetty.

Q. You had no line forward on the west side?

A. No, sir.

Q. It was on the west side of the jetty?

A. Yes, sir.

Q. Was there any wind?

A. Not very much; there was a little sea, but very little wind.

Q. From which way?

A. About southeast, as near as I recollect.

Q. Right over the stern?

A. The way she was laying.

Q. The jetties run northeast and southeast?

A. Yes, sir.

Q. On the west side?

A. Yes, sir.

Q. How far from the west jetty?

A. Must have been about one thousand feet.

Q. How long was — ship?

A. About 275 feet.

Q. How did she go over on the jetty?

A. I do not know anything about that.

Q. While getting her off, she got on the jetty?

A. Yes, she swung over on the jetty.

Q. If the wind and sea were on the starboard side, how did she get on the jetty?

A. There was a current.

Q. Which way was it setting?

A. Eastward.

Q. Where from?

A. Gulf current.

Q. Does not the Gulf current set to the westward at that point?

A. Sometimes it does, and sometimes it does not. At that time it was to the westward.

Q. You had no anchor on that side to prevent her from swinging on the jetty?

A. She just touched on the jetty; that is all.

Q. That is where you took hold of her with the tug?

A. Yes, it was stern in by the time we were ready for service.

Q. How long did she stick on the jetty when you were getting her off?

A. After getting the hawsers and everything away, *she* must have

been a couple of hours before we could get to sea with her, after we hove her off the jetty; we hove her off entirely clear of the jetty.

Q. Had she been floating before she struck the jetty?

59 A. No, sir; on the ground gliding along, striking once in a while.

Q. How did you come to go down to Velasco on the 9th, about this matter?

A. Because I was sent down there with a letter from the agent.

Q. From Moller?

A. Yes, sir.

Q. He gave you a letter to the captain?

A. Yes, sir; after he showed me a telegram that my services were needed, I went down to Velasco with a letter and went to the captain.

Q. Which individual of the firm of Moller & Company did you have this preliminary talk with before you went down on the 9th?

A. I did not have any talk with him at all; he showed me a telegram from the owners, saying to see Lloyd's agent and send assistance. They went to everybody else before they went to me. They worked with Capt. Brock and the lighter company, and then come to me.

Q. Did you know Capt. Brock was trying to get the contract?

A. Yes, sir.

Q. Why could he not get it?

A. I do not know. I suppose his was the highest bid.

Q. Did you ask Moller's influence to assist you in getting the contract rather than Brock?

A. I never asked Moller to do anything for me. He showed me a telegram where assistance was needed, and told me to go and see Sorley. That is all that passed between me and Moller.

Redirect examination by Mr. STUBBS:

Q. You spoke of him coming to you after he went to others?

A. Yes, sir.

Q. Who had Mr. Moller gone to?

A. To the lighter Co., and Capt. Brock was working with the captain of the ship.

Q. You testified about this being the 13th, as you now recollect; you are testifying from memory that you saw the telegram, or that you were informed about the telegram that had been sent, informing you or Moller that your bid had been accepted?

A. I never received any telegram; Moller received it.

Q. I want to ask you about that date—you spoke simply

60 from memory?

A. I will not be certain about it; it was on the 13th or 14th, I think.

Recross-examination by Mr. KIRLIN:

Q. When did you come back from Sabine Pass?

A. On the 13th, I think.

Q. You had not been there before that—since the 9th?
A. I had not been in Galveston; yes, sir.
Q. Between the 9th and 13th?
A. Yes, sir.

Redirect examination by Mr. STUBBS:

Q. You came to Galveston on your return from Sabine Pass and Velasco?
A. Yes, sir.
Q. Who wired Captain Burgess that you were coming right away?
A. I did myself.
Q. Do you know whether Captain Brock had been solicited to make tender by the master?
A. Yes, sir.
Q. How did you know it?
A. Because he said he was going to advertise for tenders, and Captain Brock was with him all the time.
Q. Did you know what tender Brock had made?
A. No, sir.
Q. Have you since learned what tender he made?
A. No, sir; no more than hearsay.
Q. You were not informed by Brock or the master or by any one acting for him, what his tender had been?
A. No, sir.
Q. You say Captain Brock's headquarters were there, and he was working there?
A. Yes, sir.
Q. Hadn't he been the jetty contractor there?
A. Yes, sir.
Q. Was he not at that time engaged as a stevedore?
A. Yes, sir. There were other ships there belonging to the same owners.
Q. And represented by the same agents?
A. Yes, sir. He was not on a coast where there was no one; he was among his own shipmates.
Q. Brock was loading vessels for Moller?
A. Yes, sir.
61 Q. They were agents for this and other vessels there?
A. Yes, sir, as far as I know.
Q. You have been questioned as to the method of taking off this vessel; did you take one or two schooners?
A. Two schooners.
Q. You spoke of taking a tug and schooner through the Gulf?
A. The tug came down by the Gulf and the schooner went down next day.
Q. How did the other schooner get there?
A. Next day, and the two tugboats came Tuesday.
Q. Both your tugboats?
A. Yes, sir.
Q. You went down first on the *Josephine?*

A. On the *Seminole.*

Q. The first day you went down was on the 7th of October, and when your tender was accepted, you went down on the *Josephine?*

A. Yes, sir.

Q. Where was the *Seminole* then?

A. At Sabine Pass.

Q. Had you sent for her?

A. I telegraphed for her.

Q. Did you go down afterwards?

A. Yes; with lighter and crew.

Q. Then you took four vessels there; two of your own and two which you hired?

A. Yes, sir.

Q. And you hired two barges there?

A. Yes, sir.

Q. What provision did you make with regard to equipment, cables, anchors, &c.; did you take supplies?

A. Yes, sir; we had lots of them.

Q. Where did you get them?

A. I had them. I have always had them.

Q. How many men did you have in your service altogether?

A. One day we must have had thirty-five men.

Q. You hired these lighters because you were afraid to risk the schooners?

A. Yes, sir; and because they draw more water than the lighters, and they were more easily handled.

Q. What provisions did you take; supplies for your men, for what period of time?

A. For a month. I took plenty of everything.

Q. Did you expect to be engaged a month?

A. I did not know how long. I did not think I would be so lucky.

62 Q. How far was she from water sufficient to float her?

A. About fifteen hundred feet.

Q. Of sufficient depth to float her?

A. Yes, sir.

Q. How long were — engaged in heaving on her from the time you commenced till she was in water of that depth?

A. Six or seven hours. We started about 3 o'clock in the afternoon, and floated her about 9 o'clock that night.

Q. The preceding day and a half, how had you been occupied?

A. We were getting things ready.

Q. How far did you lay anchors from the vessels, which was connected with the cables?

A. About six hundred feet.

Q. Did you have to place them again in another position?

A. We had some anchors placed six or seven hundred feet from the vessel's stern, and these we had to cable onto one hundred fathoms of chain; I suppose about two hundred fathoms.

Q. Beyond that?

A. Yes, sir.

Q. How far did you have your anchors laid?
A. I had ninety fathoms of chain.
Q. How much is a fathom?
A. Six feet. Ninety fathoms of chain on each, and then one thousand feet of hawsers in addition to that.
Q. How were these laid?
A. They were bent onto the chain.
Q. Do you mean to say that the chain was attached to the anchors?
A. They were attached to the anchors and the rope attached to the chain.
Q. Where were the anchors placed?
A. At the stern.
Q. At the end of the combined length of chain and the rope?
A. Yes.
Q. That would be about 1,540 feet?
A. Yes, sir.
Q. Am I to understand you to say that they were laid six or seven hundred feet from the vessel?
A. About 1,500 feet, I suppose.
Q. You mean that was the length of the entire chain, and you had the hawser to it?
A. Yes, sir.
Q. You used two anchors of your own and two of the vessel's anchors?
A. Yes, sir.

63 Recross-examination by Mr. KIRLIN:

Q. I did not understand Captain Clark about the two tugboats and the two schooners; I understand you to say when you went out on the 14th you had with you the *Josephine* and the schooner?
A. Yes, sir.
Q. When did the other tug and schooner go?
A. They arrived there on the night of the 15th.
Q. Where from?
A. One from Galveston and one from Sabine Pass; the schooner from Galveston and the tug from Sabine Pass. The schooner went down under sail on this side.
Q. Was that used?
A. No, sir.
Q. Was the *Seminole* used?
A. No, sir.
Q. How did you know Brock was doing stevedoring work for Moller?
A. Because I seen he was working there loading vessels.
Q. How did you know Moller was loading vessels?
A. I knew that because all the vessels at Velasco came to Moller.
Q. That was an inference on your part?
A. I knew that the vessels came to Moller.
Q. Are there not other people at Velasco loading vessels besides Moller?

A. No, sir; he has done all the loading at Velasco, excepting in one instance.

Q. Has Brock a tug?

A. Yes, sir.

Q. What is the name of his tug?

A. The *Colonel Ingalls.*

Q. Was that used?

A. Not for me, sir.

Q. It was used putting down anchors and moving Brock's barges?

A. Not for me, but she was working for the ship before I got there, putting out anchors.

Q. Was she working on the ship?

A. Not for me, while I was there.

Q. For nobody while you were there during the 16th and 17th?

A. No, sir.

Q. Did you say there were other ships in the port belonging to the owners of the *Elfrida?*

A. Yes, sir.

Q. What one?

A. *Captain Dirk* and *George Pyman.*

Q. Who was captain?

A. Captain Clark.

64 Q. Of what vessel was Captain Dirk?

A. *Lizzie.*

Q. Did that belong to the owners of the *Elfrida?*

A. I said the *Pyman* already.

Q. Where was the *Pyman?*

A. Velasco.

Q. Loading?

A. Yes, sir.

Q. Are you sure the captain's name was Clark?

A. Yes, sir.

Q. You are certain about that?

A. Yes, sir.

Q. Was not that the first time you were there, if you are right about the *Pyman* being there?

A. I know it was there during the time captain was there.

Q. Was the *George Pyman* there when you signed the contract?

A. I do not think so.

Q. She was there on the 9th?

A. I will not be certain about that.

Q. You were there twice?

A. I was there on the 14th, 15th, 16th and 17th, and there from the 7th till the 9th.

Q. Was it the first or second occasion you went down there that the *George Pyman* was there?

A. I will not be positive about that, whether it was the first or second time.

Q. Did you have any talk with Captain Pyman?

A. No, sir.

Q. Was the captain ever in your presence?
A. I seen him often.
Q. Did the captain of the *Elfrida* and the captain of the *Pyman* talk together?
A. Yes, sir.

Defendant's counsel here offered in evidence the depositions of Peter Scott, George Bradley, Thomas Brown, John James Dove, John Charles Carlson, John Boylan and Benjamin Burgess, taken at Norfolk, Va., *de bene esse*, November 7th, 8th, and 9th, A. D. 1894; the deposition of Captain Burgess, taken at Galveston, December 8, 1894.

65 M. P. MORRISSEY sworn for plaintiff.

Direct examination by Mr. STUBBS:

Q. Your name M. P. Morrissey?
A. Yes, sir.
Q. You live at Palestine?
A. Yes, sir; at the present time.
Q. In what business are you?
A. Railroad.
Q. With what railroad are you connected?
A. I. & G. N. R'y.
Q. In what capacity?
A. Clerical.
Q. Were you living at Valasco in the fall of last year, October, 1894?
A. Yes, sir.
Q. What work were you engaged in there?
A. Acting as agent for Moller & Company, ship brokers.
Q. Did you have any other employment?
A. Yes, sir; agent for Mr. Heflin, exporter.
Q. Did you have any connection with the Terminal R. R. Co.?
A. Not at that time, but previously.
Q. You have heard the testimony about the steamship *Elfrida* going ashore on the jetties on the 5th and on the beach on the morning of the 7th; were you at Velasco at that time?
A. Yes, sir.
Q. Did the master of the *Elfrida* communicate with you?
A. Yes, sir; Sunday morning he called to see me at my office.
Q. About what distance was your office from the place where the vessel stranded?
A. About four miles.
Q. What transpired when he called upon you?
A. He told me the position of the vessel and asked me if I would not assist him, and I gave him the address of Moller & Co., Galveston, and advised him to communicate with Lloyd's agent at Galveston, and wired Lloyd what facts I could get.
Q. Did the vessel go to Velasco to load?
A. Yes, sir.

Q. You had a cargo for it?
A. Yes, sir.
Q. Chartered by Moller & Co.?
A. Yes, sir.
Q. Had you heard of the vessel being aground before the captain called upon you?
A. Yes, sir.
Q. As soon as you heard it you telegraphed to Moller?
A. Yes, sir.
66 Q. Look at that and see if it is a correct copy of the telegram you sent to Moller?
A. Yes; that is correct.

Plaintiff's counsel here handed witness a telegram, dated Velasco, Oct. 6th, to Moller at Galveston, informing him that *Elfrida* was on west jetty; prospect of warping off tomorrow when sea moderates. Signed by the witness.

Q. Did you receive a reply from Moller & Co.?
A. Yes, sir.
Q. Dated at Galveston, Oct. 6th—"Use wires freely *Elfrida*. Do you need tugboat assistance? Survey must be held and diver examine bottom before accepting notice readiness to load." Signed Moller. Is that the reply you received?
A. Yes, sir.
Q. What was the next thing that occurred?
A. I believe the next thing that occurred was the arrival of Mr. Sorley, Lloyd's agent.
Q. Do you know what action was taken?
A. He went down and viewed the situation and solicited the captain to get them to agree to look for tenders to float the vessel. They received two tenders and cabled the owners that they had better accept the lowest one.
Q. What advice, if any, did you give the captain?
A. I told him the best advice I could give him was not to accept any bids at all until he had the sanction of his owners. I felt sorry for him; he was a young man and seemed very much agitated. I gave him the best advice I could, but I think he acted more upon the advice of the captain of the *Whitejacket* than upon mine.
Q. Were you present at these meetings?
A. Yes, some of them were at my office.
Q. Did you know to whom the *Whitejacket* belonged?
A. Halley, of Carduff.
Q. What statements did you make to him with regard to the vessel being in a dangerous position?
A. The only statement I remember was when I received advice from Galveston weather bureau to the effect that they had their storm signal up predicting a tropical hurricane coming west, and I told him if that come in it would be a bad thing for the ship,
67 and to use all means to protect the ship, and to act in all haste. He knew what danger he was in better than I did, and was working every day to get the ship off.

Q. What information or advice did you give him with regard to the probability of sand forming around the vessel, in case of high wind?

A. I told him in case of high wind or sea the sand would form around the ship, and render her position worse.

Q. What was said with reference to his soliciting bids from salvors at Galveston and elsewhere?

A. I could not recall anything distinctly.

Q. You advised him not to send anywhere else but to Galveston?

A. I may have done so, but do not think I did.

Q. Why do you say that?

A. Because it would look as if I were interested. It was my duty to assist him, and I am satisfied I did so. I told him the most available people was Clark & Co. at Galveston, and Brock, of Velasco. I told him if he sent to Newport News, New Orleans or New York, they would have to come down here and look at the situation and then go back and get their gear, etc., and that the longer the ship staid there the more it would cost to get her off.

Q. Why?

A. Because sand might form around it, and then, again, a storm might come and drive her higher up on the beach.

Q. What interest did you have in it?

A. I had a good deal of money invested at the place at the time.

Q. Have any interest in this trade?

A. None.

Q. What interest in seeing this ship get off?

A. A great interest. I had my money invested in Velasco, which could only become recognized as a port by the absence of such occurrences as this. A few instances of ships stranding there would give it a black eye as a port.

Q. You owned property there?

A. Yes, sir; I am sorry to say I do.

Q. The captain has stated you wired Clark & Co.?

A. It is not so; I never wired Clark & Co. All the communications I sent out were addressed to Moller & Co., for whom I was working or acting as agent. He is mistaken about that, and also in stating that I telegraphed him before he got his message.

68 I told him when he showed me the cablegram accepting the bid that I would telegraph Moller & Co. All the telegrams were handed him when he was out of town.

Q. Where was he when he received these instructions from the owners to accept the bid?

A. I could not say; he was receiving ten or twelve every day.

Q. Did the master himself show you the cable?

A. Yes, sir.

Q. Do you recall who was present?

A. Could not tell each one.

Q. What did the captain request of you with regard to wiring, if anything?

A. I do not think he made any request, but I told him I would wire Moller with regard to giving Clark's company the bid.

Q. That was to do the floating?

A. Yes, sir.

Q. The cable showed that it was received at Velasco at 1.40 p. m.?

A. Yes, sir.

Q. And the proof shows that it was delivered to the master about 2 p. m., and that your telegram was sent to Moller with reference to the same matter at 2.15 p. m. of the same day—did you ever open any of those messages?

A. No, sir.

Q. And it was some time after he showed you this telegram and you told him you would wire Moller that you did wire them?

A. Yes, sir; could not have been otherwise.

Q. There is evidence here that the cablegram was received at Velasco at 1.40 p. m. on October 12th authorizing the acceptance of Clark's bid, and evidence that Clark of Galveston telegraphed to the master at 8 a. m. on October 12th as follows: "Contract price agreed upon; getting things ready to start;" could that have been possible?

A. Impossible.

Q. Why do you say that?

Mr. Kirlin objected to any hypothetical surmise on the part of the witness.

Sustained.

Court adjourned until 10 a. m. next day.

69 10 A. M.

Reassembled.

Q. Yesterday, I believe, you were examined with regard to the advice and suggestions that you gave the captain of the steamship *Elfrida* respecting the position of the vessel and the probable dangers to be anticipated and what was proper to be done. Now, I will ask you, do you know whether he solicited bids from any other salvors, except Brock & Clark, or communicated with any other salvors?

A. I suggested to him at the time that it would be wise to communicate with the Merrit Wrecking Company of Philadelphia, and I understood he had done so. I think I also suggested that on the day the steamship *Lizzie* came into port he might get her to help her to get off. She was a light-draught vessel, and I told him some assistance might come from the steamship *Lizzie*. I spoke to the captain later and he told me that Captain Burgess had not applied to him; that if he had he would have made an attempt. The steamship *Lizzie* arrived on the 8th, and the *Elfrida* was still aground.

Q. You state the captain did make application to the Merritt Wrecking Company?

A. I understood from him that he did, as I said before.

Q. That concern is in Philadelphia or New York?

A. Yes, sir; it is a very large concern; probably the largest in the United States.

Q. Mr. Brock, you say, was working for Moller?

A. Yes, sir.

Q. Had his plant at Velasco?
A. Yes, sir.
Q. Was engaged in loading a vessel?
A. Yes, sir.
Q. What vessel?
A. Steamship *Whitejacket*. Capt. Burgess asked me if I thought there was any danger of collusion between Brock and Clark, and I told him no, because they were not on speaking terms, as they had had some trouble when in business together and were now rivals in business, and furthermore were not on speaking terms.
Q. Do you know of Brock having been asked to make tender?
A. Yes.
Q. Do you know what his tender was?
70 A. I did not know what either tender was, at least at the time they were made, but found out afterwards.
Q. What did you find out Brock's tender to have been?
A. Never did find out. I know what Clark's bid was, because it was the one accepted. Brock's was never mentioned afterwards in my hearing.
Q. I asked you about the captain's testimony wherein he stated you told him he had wired Clark Company before he had received cablegram authorizing him to accept the tender?
A. I never wired Clark & Co. at all about that; I had no communication with them, nor did I tell the captain I had wired them.
Q. What was the first information you had that the bid was accepted?
A. On October 12th when the captain told me, then I wired Moller & Co. that the bid had been accepted, and suggested that Clark be notified.
Q. Was Moller your employers?
A. Yes, sir; and they asked me to keep them posted about the matter.
Q. You obtained information from the captain?
A. Yes, sir.
Q. Did you have any information from any other source?
A. There was no other way to have gotten it.
Q. The captain had sent and received cables while on the wharf at Velasco with reference to his position; what was his position with reference to the wharf?
A. The telegraph office is directly in front of the wharf. A man in the telegraph office door can speak to a man on the wharf.
Q. He also says that he received a telegram from Clarke that afternoon, on the afternoon of the 12th of October, which despatch stated that Clarke & Co. had agreed to the contract and would start at once; do your know of his having received it?
A. Yes, sir. The captain was on shore that night and I had accommodations provided for him at the hotel. This despatch came in between 8 and 9 o'clock that night.
Q. Are you familiar with the beach and shore where this vessel was stranded?
A. Yes, sir.

Q. About the jetty that has been spoken of, please state what protection, if any, that would afford to the vessel laying
71 stranded some three or four hundred feet upon the west side?

A. No protection whatever, because it is all submerged; necessarily so, or the ship could not have drifted over it.

Q. And that jetty the steamer drifted over?

A. Yes, sir; went aground first, then drifted over.

Q. What is the nature of the shore along there?

A. Quicksand.

Q. What is the tendency of a body resting upon the sand, especially where the waters cover it, with respect to remaining in its position, or settling in the sand?

A. It would settle, because the sand would move around with every tide. The sand there is always shifting and moving.

Q. Have you ever had any knowledge of a body or substance sinking in the sand there?

A. Yes, sir.

Q. Do you know of the captain having made any efforts to get his vessel off after she had been driven upon the shore?

A. He told me so. He told me that he had worked every day for several days and had done the best he could.

Q. Was that when she was on the beach?

A. Yes, sir. He also tried when she was on the jetty, and lost an anchor.

Q. And continued his efforts afterwards on the beach?

A. Yes, sir.

Q. Had he the assistance of a tugboat?

A. I don't know, but he had Brock helping him, because I paid Brock for services he had rendered prior to the time the salvors took hold of her.

Q. Do you recollect the state of the tide on the day the vessel was gotten off on the 17th of October?

A. It was a very high tide; that is the reason why the ship was gotten off easily.

Q. How was it with reference to the ordinary full high tides?

A. That runs about 6.10, and from the reports it was about three feet.

Mr. Kirlin objected to witness testifying from reports. Sustained.

Q. Do you know of that being considered ordinary high tide; you did not measure it; do you know it was high tide from
72 your own observation?

A. Not from my own observation, but from reports.

Q. Was there a large rise in the river?

A. Yes, sir.

Q. What did you notice about the tide?

A. I noticed it was unusually high in the river at Velasco, about four miles from the mouth of the river.

Q. Regarding the position of the vessel as she lay upon the beach, to what wind was she exposed?

A. Wind from all directions, as the coast is on a level with the gulf.

Q. Exposed to winds from the north?

A. Yes, sir.

Q. That is when it is off shore?

A. Yes, sir.

Q. Please state whether or not the vessel supplied herself with coal at Velasco when she was taken off the beach.

A. Yes, sir; and before she sailed for Newport News.

Q. Do you know how much coal she had?

A. About fifty or sixty tons.

Q. Do you know who actually wrote out this contract that has been put in evidence?

A. The one that was signed I wrote.

Q. How did you come to write it?

A. Because Mr. Sorley sent a contract over to the captain to sign and he would not agree to it.

Q. Why would he not agree to it?

A. Because it had no time limit.

Q. And the captain wanted a limitation of time?

A. Yes, sir.

Q. Then you wrote out this contract at whose request?

A. At the captain's request?

Q. And how was the contract changed from the one that Mr. Sorley had provided?

A. That was the principal change—limiting the time to twenty-one days.

Q. Can you state the captain's reason for desiring the insertion of that in the contract?

A. He claimed it was a matter of protection for himself and the ship—that it might drag on indefinitely and he would have no recourse, and he was anxious to get the ship off.

Q. Who was present when that contract was rewritten with this stipulation?

73 A. I cannot remember. It was in my office. I know the captain was there, but cannot say that anybody else was.

Q. Have you the telegrams you received in regard to this vessel from Moller & Company?

A. Yes.

Q. Will you please let me see them?

A. Yes (handing him telegrams).

Mr. Stubbs here offered in evidence all the telegrams, without reading, to save time.

Mr. STUBBS: Here is a telegram from M. P. Morrissey to J. Moller & Co.

The WITNESS: No, from J. Moller & Co. to M. P. Morrissey.

Q. Can you tell the date of that telegram?

A. October 6th.

Q. It says: "Use wires freely,"—what was the necessity of using

wires freely and having survey held of her bottom before reloading?

A. When a ship gets aground she loses her rating and owners would not ship goods in her till she was reinstated.

Q. Would you be kind enough to explain what Lloyd's is, what the institution is?

A. It is a registry of all ships in the world and the rating covers the underwriting. When a ship is built she is registered at Lloyd's.

Q. Her rating and classification at Lloyd's determines the question of her insurance?

A. Yes, sir; it is very essential.

Q. That means the insurability of the cargo rather than the vessel itself?

A. Yes, sir; she must be rated A1 before she can get insurance on cargo.

Q. You were interested as representing the shipment of the cargo?

A. Yes, sir.

Q. Then upon the 6th you made the report which I have read and the other telegrams?

A. Yes, sir.

Mr. STUBBS: I now offer in connection with the witness's testimony this telegram from J. Moller & Co. to M. P. Morrissey, dated October 7th, received at 8.25 a. m.: "Bureau advises tropical hurricane off Port Eads. Recommend using every means to protect *Elfrida* quickly."

Mr. STUBBS: I now offer in connection with the evidence of the witness a telegram from M. P. Morrissey to Moller, dated
74 October 7th, and reading: "*Elfrida* beached; immediate assistance imperative. Fear drifting higher up. Will stand by wire all day."

Q. That was after she had gone over the jetty?

A. Yes, sir.

Q. Again on the 7th a dispatch from Moller to Morrissey: "Is ship making water? Will send assistance as soon as possible." To which you replied: "Ship not making water;" and again a report from Morrissey to Moller: "Think not in danger; laying head on, straight and firm. Prospects good, with tug and anchors at work; she will come off when ballast pumped. Not drifting any." From whom did you get that information?

A. From the captain of the *Elfrida*.

Q. You already testified that it was impossible for any information to have been imparted to Clark and Co. at 8 a. m. or before that time on the morning of the 12th respecting the acceptance of the bid, when the cable was not received till 1.40 p. m. of that day. I will ask you whether you are a practical telegraph operator?

A. Yes, sir.

Q. Do you know by what way those telegrams, or rather cablegrams, come to Velasco; do they pass through Galveston?

A. No; they come through Houston.

Q. They do not come to Galveston en route?

A. No, sir.

Q. What is the usual time of transmission of a cable from England to Velasco?

A. If it goes through without interruptions, it should be about 30 minutes.

Q. In the usual course?

A. An hour would be safe calculation, presuming that it got behind some other messages and was delayed.

Q. Then, having been received, as we assume from the testimony of the operator, at 1.40 p. m. on October 12th, it would have left England about an hour prior to that time?

A. Yes, sir.

Mr. KIRLIN: I object to the answer as mere inference.

Objection overruled.

Q. Do you know whether or not the cable was in cypher?

A. It was not in cypher.

Q. And you wired Moller & Co. after he told you?

A. Yes, sir.

75 Cross-examination by Mr. KIRLIN:

Q. When did you first learn that the ship had struck the jetty?

A. Late on the afternoon of the 5th October.

Q. When did you first see her?

A. I did not see her at all.

Q. Did you not go down there?

A. No, sir.

Q. Didn't you telegraph to Moller on the 6th—"*Elfrida* reported aground mouth of the river; am going down and investigate; will wire later"?

A. Yes, sir.

Q. Did you not telegraph at 3.15, about an hour and a half later on the same day—"*Elfrida* on west jetty; prospect of warping off tomorrow when sea moderates"?

A. Yes, sir.

Q. And you say you did not go down to investigate?

A. When I sent the first message, I intended to do so, but could not find conveyance, and telephoned down and used all the means of information I could.

Q. Did you not see the actual position of the vessel?

A. Not from a close point, but through a powerful glass from the hotel building.

Q. In Velasco—how far away?

A. About three miles in direct line.

Q. And you made her out very distinctly; saw her position?

A. Yes, sir.

Q. Could you see whether she changed at all?

A. No, sir.

Q. You do not know of your own knowledge whether her position ever changed, after she got across the jetty, till she was got off?

A. No, sir.

Q. You were very anxious she should get off as quickly as possible?

A. Yes, sir.

Q. So was the captain?

A. Yes, sir.

Q. Was there a vessel named the *Geo. Pyman* in port when the ship stranded?

A. No, sir.

Q. Was there a vessel by that name in port during the time she was stranded?

A. No, sir; she came in after she got off.

Q. It belonged to the same owners as the *Elfrida?*

A. Not exactly. She arrived there the 23d of October. She belongs to a firm of Pymans, the same family as the *Elfrida* owners but they are two different companies.

76 Q. Owned by the same people but by different companies?

A. Yes, sir.

Q. Do you remember what the condition of the weather and the sea was at the time the vessel stranded?

A. Do you mean the time she stranded on the breakwater?

Q. Yes, sir.

A. Strong sea and strong wind from the eastward, and the current was setting in that direction.

Q. What is the compass course of the beach?

A. I should think it was about northeast and southwest; would not be positive about that; it may be southeast and northwest.

Q. Is it not about east and west?

A. It might be.

Q. What is the purpose and function of these jetties, between which this vessel was coming up?

A. Its purpose is to remove the bar from the mouth of the river.

Q. By what means do they remove the bar?

A. They are a continuation of the banks of the river out across the bar which confines the current.

Q. Are they as much as ten feet under the water?

A. In the incompleted parts they were at one time. The foundation has been laid, but has not been completed.

Q. How far is that under water?

A. About opposite where the ship when end on it was over water, but that one was completed.

Q. From there all the way to the shore?

A. Yes, sir.

Q. Of what does it consist?

A. Rock.

Q. It was a breakwater?

A. You might call it that.

Q. How high above the water?

A. About two or three feet.

Q. While the west jetty might be so submerged as not to afford any protection, you would not like to say that the east jetty would not afford some protection to the vessel lying to the west?

A. It might afford some, but in a high sea the water would break over the east jetty.

Q. Of course, the top of the waves would necessarily strike it?

A. Yes, sir.

Q. Was not that also the purpose of the west jetty to prevent the drifting of the channel which was dredged out?

A. Yes, sir; that is primarily its purpose.

Q. How much water is there between the jetties at or about the place where the ship stranded?

77 A. At that time there must have been 12 feet; with ordidinary tide it shows considerably less in different places.

Q. That was at the bar where she first struck?

A. Yes, sir.

Q. That, I suppose, is the worst place inside the jetties?

A. Yes, sir.

Q. How much draught could a vessel at that time load to in Velasco and still go out of the bar?

A. Thirteen and fourteen feet, as the tide varied at that time.

Q. Was not the *Elfrida* going in at the deep-tide time at the time she stranded?

A. That I do not know.

Q. How much cargo could you get into the *Elfrida* with a draught such as you have mentioned—half a cargo?

A. About that.

Q. Was the rest lightened outside?

A. Yes, sir; on lighters. She could carry 1,755 tons on fifteen feet.

Q. You could load to fifteen feet?

A. No, you could not; but you can load from that to what she would take on thirteen feet.

Q. She was stranded, as I recollect the evidence, Friday, in the afternoon, on the 5th October?

A. Yes, sir.

Q. And got over the jetty Sunday morning?

A. I believe so.

Q. And upon the beach?

A. Yes, sir.

Q. Did her position change after that?

A. As far as I know, it did not.

Q. She was then lying parallel with the jetties—head on the beach, with more water at the stern that at the bow?

A. Necessarily so; yes, sir.

Q. Is the beach shelving or very flat?

A. Very flat.

Q. How long had you been in business at Velasco previous to this?

A. About three years.

Q. Had any other vessel stranded on the beach during that time?

A. No, sir; not on the beach.

Q. Has any other vessel been on that beach since?

A. No, sir.

Q. Was there any change in the weather from the time the vessel stranded until, say, about the 10th, as far as you recollect?

A. Yes, sir; there was a change for the worse on the 7th, a heavy sea running that moderated after some hours.

78 Q. She struck on the 6th?

A. She struck on the 5th.

Q. And it was by reason of the sea that you spoke of on the 7th that she went across the jetty?

A. She went across before that.

Q. Was it not on the early morning of the 7th that she went across?

A. It might have been; yes, that was Sunday morning.

Q. Did you advise Moller that there was any severity in the weather or sea there on the 7th?

A. Cannot remember now; if that telegram is there I did.

Q. On the 7th it appears that Moller telegraphed you at 11.45: "Is ship making water? Will send assistance as soon as possible," and you replied at 11.55: "Ship not making water. Think not in danger. Laying head on, straight and firm. Sea moderating and prospects good. With tug and anchors out she will come off when ballast pumped. Not drifting any"?

A. Yes, that was the captain's report to me.

Q. Was that statement that the sea was moderating correct?

A. According to what he told it was; he had just come up from the wreck.

Q. Was there any more severe weather after that?

A. My recollection is there was one day after that. You will find my message wherein I advised Moller of it.

Q. Did you go down to the beach to see whether it had any effect upon the vessel?

A. No, sir; I staid in my office.

Q. I do not see the telegram, do you recall it?

A. My impression is there was one day after that when the sea ran high, but if it is not in those messages I would not like to say it.

Q. There is nothing in your telegrams till after the contract price was agreed upon, in relation to the weather?

A. That was probably the time. There was one day; I do not recollect the day it was.

Q. In fact, there is not anything in them till the ship was floated about any severe weather?

A. I remember something about it. I think heavy weather prevented them laying anchors. My recollection is that the weather was fine, except one day; but I cannot recall the day.

79 Q. How was the weather after they got her off?

A. I do not know. I did not pay much attention to it then.

Q. When Mr. Clark first appeared in Velasco; when was that?

A. About two or three days after the vessel stranded.

Q. About the 7th or 8th?

A. Yes, sir.

Q. How long did he remain there on the first trip?

A. Probably a day; maybe two days. I did not keep any particular track of the captain's movements.

Q. When was he there next, as you can remember?

A. Cannot say. It had no significance to me, and I did not think anything about it. His dealings were with the captain, and while I might have seen him I had nothing to say to him.

Q. You were instructed by Moller that they wished Mr. Clark to attend to the salvage matter?

A. I understand Moller recommended them to the captain.

Q. Did they not inform you that they wished Mr. Clark to attend to the salvage matter?

A. Yes, sir.

Q. Mr. Brock was then on the ground and had been doing something?

A. Mr. Brock was engaged in working for Moller, and I presume Mr. Moller wanted Clark to do it because he did not want Brock to neglect his work with him.

Q. Brock had been doing something there?

A. Yes, sir.

Q. With tugboat and ship's anchors?

A. Yes, sir.

Q. Did not Brock object to you of being left out exclusively?

A. Not to me, but I understand he objected to it.

Q. How did he learn that Moller wished Clark to attend solely to the matter?

A. I think I told him because Moller wanted him to attend to the work he was engaged in lightering cargo for the steamship outside.

Q. Did he make any objection to Mr. Clark being preferred to himself in the salvage matter?

A. Not to me.

Q. Do you recollect receiving from Moller a telegram on the 7th at 4.40 p. m.: "Clark's tug with hawser gone. Recommend Clark attend solely to the matter, he being practical wrecker"?

A. Yes, I remember that. That was after the captain wired Moller for assistance.

80 Q. Do you know that Burgess wired Moller for assistance?

A. Yes, because I wrote the message for him.

Q. Didn't Burgess wire Moller to advise Lloyd's to wire him when assistance would be sent instead of asking him to send assistance?

A. He may have done so.

Q. Is not this the message you refer to as having written?

A. Yes, on the 7th; that is the message.

Q. There is nothing in that asking Moller to send assistance?

A. No.

Q. What action did you take on the telegram that I have just read, saying he wanted Clark to attend to the matter?

A. I told the captain that Moller recommended Clark and he could act upon it as he saw fit, that it was merely a suggestion.

Q. You told the captain that Mr. Moller recommended that Mr. Clark have sole charge of the matter?

A. Yes, sir.

Q. What did the captain say?

A. I cannot remember, but I think he said he would not make a contract with anybody till his owners advised him to do so.

Q. What led you to make the answer which you did to Moller's telegram about five minutes later, at 4.56—"Think *Elfrida* will accept Clark"?

A. The captain must have told me. I could not have sent an answer till I had shown him the message I had received.

Q. On the 8th at 9.45 you appear to have received a telegram from Moller, asking whether ship was tight, so they supposed the ship was high on the beach and were inquiring how much water around it?

A. Yes.

Q. Also asking whether Clark was at work?

A. Yes.

Q. You answered, "Clark not begun yet, as sea too rough; ship apparently tight in nine feet of water, not beached high." Upon what information did you give that answer?

A. Upon information from the captain.

Q. Was that the only reason Clark did not begin?

A. I do not know; that is what the captain told me. Clark arrived there Sunday or Sunday afternoon on the 7th, I think, and immediately went down with the captain to the ship and what they did there I do not know.

Q. How did you get hold of the captain every time you wanted him?

81 A. He had a buggy to drive up and down and was in town two or three times a day; then I had messages sent to him.

Q. And you were kept constantly informed of the situation in that way?

A. Yes, sir; I could not have answered the communications I received unless I did so.

Q. Did you say anything to Brock about Moller wanted Clark to attend solely to the matter?

A. Yes, I received message from Moller to that effect and communicated the contents to Brock.

Q. Did you see Brock's telegram to Moller on the 8th?

A. Did not.

Q. He appears to have telegraphed to Moller on the 8th—"Have been on ground and rendered assistance, *Elfrida*, running anchors, &c. Why shut me out altogether?—am able to furnish plant." He also telegraphed to Beers, the national board's agent, the same day—"If you are Lloyd's agent, why not let me work on *Elfrida* as well as any other person. I was on the ground and ran anchors out before *Seminole* came," and he telegraphed to Jas. Sorley, Lloyd's agent, on the same day: "Have already rendered assistance to *Elfrida*. Before you close with others give me a chance. Reference

W. F. Beers & Co., J. Moller & Co. Am doing their work here; have ample plant." Did he let you see any of those messages before he sent them?

A. No, but we had some general conversation to the effect that he did not want to be shut out.

Q. Did you receive telegram from Moller on that day saying to inform Brock privately that as master wanted assistance he could not help sending Clark?

A. I probably received such a message, but do not remember when I got it.

Q. On the 8th, at 1.40 p. m., according to Vaughan's deposition, you received a telegram informing you to tell Brock privately that as master of *Elfrida* wanted assistance "we could not help sending Clark. We have no objection to Brock," &c. Do you recollect that?

A. Yes, sir.

Q. Why was it necessary to inform Brock privately about the matter?

A. Mr. Moller certainly did not want everybody told about it.

82 Q. What consequences did you attach to it?

A. Did not attach any. I suppose he did not want me to tell everybody about it. I told Brock and nobody else.

Q. What difference would it make?

A. I really do not know. I carried out my instructions.

Q. You showed Brock the message?

A. Yes, sir.

Q. Brock is now dead?

A. I am sorry to say he is.

Q. Are you acquainted in Galveston?

A. Yes, sir.

Q. Been in business here?

A. Yes, sir.

Q. You know what other salvors there are in Galveston?

A. I know of the Galveston Lighter Company. I do not know that they are very good salvors. They have been employed here in lightering cargo to vessels, of which there were nine or ten at that time.

Q. Who are the officers of the company?

A. I understand that Mr. Moller is interested with Mr. Adoue.

Q. Do they have tugboats?

A. Yes, sir.

Q. Are there other tugboats in Galveston besides those?

A. Yes.

Q. Like the *Seminole?*

A. May not be like the *Seminole*, but they are tugboats.

Q. Belong to her class?

A. I do not know about that. I am not experienced in such matters.

Q. Were you not surprised to hear that Clark had the only available tugboat in Galveston?

A. I placed a different construction upon that. I construed it as meaning the only one procurable at that time, because at that season of the year they are very busy.

Q. Did you inform Captain Burgess that Clark had the only available tug in Galveston?

A. I do not think I did.

Q. Then those lighters belonging to the lighter company, they are not propellers?

A. Some of them have, but I do not think they are as powerful as tugboats.

Q. They are powerful enough to move themselves and their loads?

A. Yes, sir.

Q. Powerful enough to go to Velasco?

A. Yes, in fine weather.

Q. What are they—side-wheelers or turn-wheelers?

A. Turn-wheelers, propellers, steam lighters.

Q. On the 9th, at 8.35, you had a telegram from Moller saying that Langbehn would come in the morning, and to "try and
83 have everything ready the morning he wishes to return. Inform Clark"—Clark must have been there on the 9th?

A. Yes, sir; and I think that Mr. Langbehn, Mr. Moller's partner, was coming down to settle the accounts of the steamship *Whitejacket.*

Q. According to this, Clark was there the 7th, 8th and 9th?

A. Yes, he might have been, but I do not remember anything particular about Clark's movements.

Q. On the same day at 12.10 you telegraphed to Moller, "Think *Elfrida* can get off—swings freely on high tides." Upon what information did you send that message?

A. Upon information from the captain.

Q. Did you not talk with anybody else in Velasco about this matter?

A. Perhaps so, but do not think I would have wired anybody's information except some one who knew.

Q. If anybody else besides the captain had given you reliable information, I suppose you would have wired that as well as that you received from the captain?

A. That would depend upon the party giving the information.

Q. Was Brock out every day so he could see the ship?

A. Yes, but I did not give it upon information from Brock. I consulted with the captain every day and communicated his information principally, if not altogether.

Q. She was swinging freely on high tide?

A. Yes, at the time I sent this message, that was the information I had.

Q. Do you recollect how high that tide was?

A. I do not.

Q. Sometimes the tides rise higher at Velasco and Quintana than at other times?

A. Yes, sir.

Q. Is not the average tide two feet?
A. That is above the average.
Q. Is not the average tide, according to the engineer's report, only 8.10?
A. Yes, sir.
Q. That is pretty close to two feet?
A. Yes, sir; but it is not two feet; two feet is above the average.
Q. How much higher than that does it rise, and what is the cause of the additional rise?
A. I have seen it rise to three feet frequently. The moon and the wind affects the tide.
84 Q. How often did it get to three feet?
A. At some stages of the moon, and when a strong east wind blows.
Q. What stages of the moon gives the high tide?
A. I do not know exactly. It is from the last quarter or the first quarter. I do not know exactly, but it governs the tide, and sometimes the east wind banks the water up high.
Q. How much will the east wind alone increase your tide, if an easterly storm has been prevailing in the Atlantic?
A. There is no telling.
Q. How much have you seen the tide rise in Velasco?
A. About two or three feet, or two and three-tenths. Have seen that several times, that is, if the tide gates are correct.
Q. What do you mean by the inference in your telegram, "showing no bed"?
A. Because if she was "in bed," I do not think she would swing. I meant that she was not embedded in the sand.
Q. That meant she was fast forward?
A. Yes; and her stern was swinging.
Q. When did Mr. Sorley go down first?
A. Monday or Tuesday, after the vessel stranded. I remember he did not come right away as he was said to be sick and did not come at once.
Q. He was rather old and infirm?
A. Yes, sir.
Q. Do you know Mr. Sorley personally?
A. Yes, sir.
Q. How old was he?
A. I do not know, but I know he was an old man.
Q. You had a telegram saying he was not able to come down on account of being ill?
A. Yes, sir.
Q. Was he then in infirm health?
A. He was not very strong. He came over on the train and went to the *Elfrida*.
Q. As soon as he was able to come down he did?
A. Yes, sir.
Q. He has since died?
A. Yes, sir.
Q. Was he not a good deal bent with age?

A. Slightly bent; yes.

Q. He appears to have sent a cable to Lloyd's, in London, on the 9th; presumably, he was there on that day?

85 A. Yes, that is my recollection, a few days after the stranding.

Q. Was that the time these bids were received?

A. Yes; I understand when he came down he advised the captain to get bids for floating the ship.

Q. Mr. Clark was there then?

A. Yes.

Q. Did he make his bid then?

A. I do not know.

Q. Did you see this letter which has been put in evidence?

A. Yes, sir; I think I saw that.

Q. Did the captain consult you about taking tenders?

A. Yes.

Q. You advised him to do it?

A. I told him he could not go back on what Lloyd's agent told him.

Q. You said something about advising him to communicate with the Merritt Wrecking Company?

A. Yes, sir.

Q. When was that?

A. I do not know exactly. As soon as the ship was stranded, before the other contract was made.

Q. Do you state positively that he told you he had done so?

A. Not positively; but I understood from him that he had or would do so.

Q. Do you know anything about their manner, mode or operation of getting vessels off?

A. I have read a good deal about it.

Q. Their method is to haul her off with anchors, the same as Captain Clark did?

A. Yes, sir; I suppose that is what they would have done.

Q. Did you ever have any experience in getting vessels off before this?

A. I never had any experience in this case.

Q. You knew all about it and the methods pursued?

A. Yes, sir.

Q. As Lloyd's agent thought it better to take tender—you advised the captain to do so?

A. He asked me, and I told him he ought to be governed by the advice of Lloyd's agent, but not to accept any bids till his owners instructed him. He was a young man and I felt sorry for him, and I told him that I thought by doing that it would keep him out of trouble.

Q. Do you know whether or not Mr. Langbehn saw the captain when he was there?

A. I presume he did.

86 Q. He was there on the 11th and telegraphed Moller that *Elfrida* was running anchors herself. Is that fixed in your mind?

A. The *Whitejacket* sailed on the 10th. He must have been there on the 11th, because the train did not leave till mid-day.

Q. Did you hear of any change in the vessel or her position while Langbehn was there?

A. No. The only time I heard was when the captain told me he had been working with anchors and that she had gotten higher up.

Q. Did you hear talk of sand-banking?

A. Yes, sir.

Q. From whom?

A. The captain.

Q. Did he say whereabouts?

A. He did not go into details.

Q. How long did Mr. Langbehn remain there?

A. I think he went back the next day.

Q. Did he return on Clark's tug as he telegraphed you he wished to?

A. I do not remember.

Q. Clark was there at the same time?

A. He may have been.

Q. Was the captain's cables to the owners sent through your office?

A. Sometimes they were. My office was upstairs and the telegraph office was downstairs in the same building.

Q. Was it in your office he got the code?

A. I had no code in my office. He brought it up from the ship and kept it with him.

Q. Was there any talk between you and the captain with reference to the increased cost of moving the vessel in case the sand banked?

A. I think there was. I told him the more sand banked up, the more it would cost to get her off

Q. Was it your opinion that too much time was being lost in negotiations?

A. I think it was. I did not like to see the ship laying there.

Q. You told the captain he had better be doing something?

A. I advised him to cable his owners frequently.

Q. You knew the tenor of his answers from cables to his owners?

A. I did not.

Q. Did he not talk them over to you?

A. Might have been done. I only remember the one where the bid was accepted.

87 Q. Do you remember the one where they thought the tender was excessive?

A. I do not remember that.

Q. On the 9th did he communicate to you his telegram received 3 p. m. of that day, after the tender had been submitted informing him not to act without their instructions, Lloyd's underwriters communicating direct, as considered tender excessive?

A. He might have told me, but I have no particular remembrance of it now.

Q. Did you see the captain's cables of the 9th and 11th in which he recommended to his owners the acceptance of the 4,580?

A. I cannot say that I did.

Q. And telling them there was danger of the sand banking and cost of floating the vessel being increased?

A. Cannot say that I saw those.

Q. Who was present at general talks with you on that subject?

A. I do not know.

Q. You say you talked with him daily?

A. Yes, every day.

Q. On the general subject of the vessel being aground?

A. Yes, but I cannot remember everything that was said.

Q. You say the telegram of the 12th when it was delivered?

A. Yes.

Q. Did you observe at that time that the authority to accept was qualified—"if lower impossible"?

A. I do not think I took any notice of that part of it. I believe he showed me the cable, or told me the bid had been accepted.

Q. Didn't you see the cable at the time—did he not give it to you?

A. I do not know. I did not stay there long. I went to the office to wire Moller that the bid had been accepted.

Q. That was not the fact, was it?

A. It was, as I understood it.

Q. The instructions were to accept 4,580, if lower impossible—that you say you do not remember?

A. The captain had the cable in his hand and told me the bid had been accepted. That is all I remember.

Q. And when you telegraphed Moller, you did not say anything about the qualification?

A. I did not understand that there was any qualification.

Q. You telegraphed the plain words that the tender had
88 been accepted?

A. Yes, sir; that is the way I understood it.

Q. Your telegram was, "Pyman cables accepts Clark's bid. Tell him better get here quickly. Answer"?

A. Yes, sir.

Q. What was the occasion of putting in that clause "better get here quickly"?

A. Because I was anxious to see the ship off. She had been there a long time, and I was anxious to see her afloat.

Q. Did you ever have any more conversation with Brock about his being shut out, after you acquainted him with the tenor of Moller's telegram dated the 8th?

A. I do not think I did.

Q. Do you know whether Capt. Clark saw Brock when he was there?

A. I could not say. I was in my office the most of the time.

Q. After the time Mr. Clark was there you had no further conversation or application from Brock to be let in on the salvage contract?

A. I cannot remember about Brock asking me to be let in on any occasion. I showed him the wire I received, but know not what the occasion was of sending it. I inferred he had wired Moller direct, but do not know anything about it.

Q. After that you had no talk with him about the matter?

A. I might have had a casual conversation with him, but of no import.

Q. Did you tell him Moller had no objection to his rendering assistance, if he could make his own agreement?

A. I showed him that telegram.

Q. Do you know that he assisted in moving the vessel?

A. Yes, because I paid the bill.

Q. Was not that bill for work done before the salvors' operation began?

A. It must have been.

Q. You know Brock was there working in connection with moving the vessel, for which work you did not pay him?

A. I understood so.

Q. This bill you paid was a small bill?

A. I think it was $150 or $100; something about running anchors, and some provisions.

Q. Was Mr. Sorley in Velasco again after the first occasion?

A. I cannot remember now whether he was or not.

89 Q. You remember receiving a telegram from Moller on the 24th, saying, "Two telegrams here for *Elfrida;* shall we open same and telegraph contents?"

A. Yes, I remember that. She was at the wharf in Velasco then, before she sailed to Newport News.

Q. You telegraphed back on the 25th, "Repeat cables here"?

A. I do not remember what answer I sent. I have not seen them since I sent them.

Q. Were the cables repeated?

A. I cannot say.

Q. Did this tropical hurricane you say Moller telegraphed you was coming materialize?

A. I do not think it materialized to any great extent. It might have caused some slight disturbance, but nothing very great.

Q. You showed the telegram to the captain?

A. Yes, sir.

Q. How far off is Port Eads?

A. It is at the mouth of the Mississippi river.

Q. In miles?

A. I do not know.

Q. How many days was Mr. Clark there, if you remember?

A. As I said before, I do not remember anything particular about Clark's movements. He was there several times. I remember the first time he came. That is the only distinct remembrance I have of his movements.

Q. Did he not come down with Mr. Sorley?

A. He may have.

Q. That would be twice?

A. He was there twice at least.

Q. He was there again when the ship was pulled off; that would be three times?

A. Yes, sir.

Q. You say he did come with Sorley?

A. I did not say that. He may have come, and I think he did, but I would not be positive.

Q. Which way did the heaviest winds come from to Velasco?.

A. East and southeast.

Q. Don't you have gales from the northeast?

A. Yes, sir.

Q. Are they not generally much severer than gales from the southeast?

A. Colder, but not stronger.

Q. A southeast gale would throw the sea right straight up the jetty?

A. Yes, into the entrance to the harbor.

90 Q. Did you receive this contract from Mr. Sorley himself?

A. I think it was handed to me by the captain.

Q. Was it in typewriting?

A. I cannot remember now. I remember the captain said he would not accept it.

Q. Do you remember the day it was received?

A. Do not know.

Q. It must have been drawn up after the 12th?

A. I do not know, but I am under the impression Sorley brought it from Galveston with him.

Q. There was no authority at that time to contract?

A. I do not know about that.

Q. You know authority came on the 12th?

A. Yes, but I did not know whether Sorley had authority as Lloyd's agent or not, and I thought anything he said in the premises would be final.

Q. The only change you made in it was to insert the 21-day clause?

A. That is the only material change. There might have been some minor ones.

Q. Was there any other vessel in port during the time *Elfrida* was there, except the steamship *Lizzie?*

A. The steamship *Whitejacket* was in the control of the Lloyds when the *Elfrida* went aground, and the *Lizzie* came in when the *Elfrida* was ashore.

Q. Do you know how deep the water would be, say 700 feet from where the *Elfrida* lay?

A. It deepens gradually, but I could not say how deep it would be at 700 feet distant out from the shore.

Redirect examination by Mr. STUBBS:

Q. You stated there were other tugs and lighters in Galveston and that the Galveston Lighterage Company, in which Mr. Moller was interested, had lighters and tugs?

A. I did not say he was interested, but I understand he is connected with the lighterage company financially.

Q. Do you know of that company having *being* applied to to send relief down there?

A. I do not.

Q. Do you recollect the time the *Elfrida* left Velasco for Newport News?

A. Yes, I think I can give you the date. We settled the accounts on the 26th of October; it was that day or probably a day later.

Q. When you wired "Clark's bid accepted" to Moller &
91 Co., "tell him better come here quickly," what is the reason that you added that to your telegram?

A. I was personally interested in seeing the ship get off.

Q. Would his getting there quickly have any effect upon her getting off more quickly?

A. I think so. I think the longer she remained there the more difficult it would be to get her off. The longer she lay there wallowing in the sand the more deeply imbedded she would become.

Q. You understand the position she occupied at Velasco?

A. Yes, sir.

Q. You have been on that coast yourself?

A. Yes, sir.

Q. You know the nature of the soil?

A. Yes, sir.

Q. Did Captain Burgess consult you about this telegram dated the 12th, addressed to Sorley, Lloyd's agent—"Have received cable. Accepts tender 4,850. Please instruct Clark steamer not worth salvage, accept vessel in lieu of salvage"—did he submit that to you?

A. I do not know that he did.

Q. Did he consult you with regard to sending this telegram to Moller on the 14th: "If Clark cannot come send some one at same price. Too much time already lost"?

A. Yes, sir; he asked me about that, and I told him I thought it would be a good idea to hurry things up. I remember that distinctly.

Recross-examination by Mr. KIRLIN:

Q. Were you subpœnaed in this case?

A. Yes, sir.

Q. By whom?

A. I do not know. The subpœna was served by the U. S. marshal.

Q. Where was it served?

A. In the court here in Galveston.

Q. You come down from Palestine?

A. Yes, sir.

Q. At the request of the libelant?

A. Yes, sir.

Re-redirect examination by Mr. STUBBS:

Q. Had you been previously subpœnaed?
A. Yes, sir, last April.
Q. By both sides?
A. I do not know which side. I saw Judge Lockhart at the time, and I thought it was by that side.

92 ARTIE VAUGHAN'S deposition read by counsel for defendant, Mr. Kirlin, who also offered in evidence the further deposition of Artie Vaughan taken subsequently with telegrams attached.

Captain A. D. SMITH was then sworn for plaintiff.

Direct examination by Mr. STUBBS:

Q. You are a resident of this city and county?
A. Yes, sir.
Q. How long have you lived here?
A. Forty years.
Q. What business are you in?
A. Pilot on the Galveston bar.
Q. Are you familiar with the Gulf coast along Galveston island, extending down to and beyond the mouth of the Brazos river?
A. Yes, sir; I have had some experience on the Brazos. I ran a boat there some time while they were building the jetties. I have been up and down that coast.
Q. What is the nature of the shore and the beach extending out say from three to five hundred feet from the line of ordinary tide, and what is the nature of the bottom?
A. Sandy.
Q. How many years have you been engaged on vessels in and about Galveston?
A. For the last twenty years.
Q. Have you had any experience or knowledge of vessels going ashore along this coast?
A. I have had vessels ashore here on Galveston bar.
Q. And along the Gulf coast?
A. I never had one ashore on the Gulf coast.
Q. Do you know of any one going ashore?
A. I know of the *William*. She went ashore on the island and I assisted to get a bark off the beach down here some ten years ago.
Q. In the case which I shall put to you I shall ask your opinion of the risk a vessel undergoes wrecked on the beach, drawing ten or twelve feet of water with her ballast, beached one thousand feet from water of sufficient depth to float her, and where she lies the waters range in depth, according to the tide, from six to nine feet, by pumping out her ballast it may lighten her 18 to 20
93 inches; as she lies in the month of October from the 5th to the 17th, she is imbedded in the sand to the depth of about two feet and about three to four hundred feet from the line of ordinary tide, lying west of the jetty—will you please state, in your own

way, the nature of the situation and the probability of risk she would incur from the winds and seas lying in that position?

A. Was she on the bottom?

Q. Yes, sir.

Mr. Kirlin objected on the ground that no predicate had been laid, also that the question does not embody the essential fact that the vessel was lying bow on. Objection overruled.

Q. With regard to the knowledge you have had of other vessels stranded on the beach, what was the effect of that stranding?

A. Do you mean the effect the sea would have upon them lying there?

Q. Yes, sir.

A. And the vessel in quicksand?

Q. Speaking of the vessels you know?

A. They both were upon the beach.

Q. Is that beach of the same nature as that at Velasco?

A. Yes, sir.

Q. State, in those experiences you refer to, whether or not there was any tendency to settle in the sand, or of the sand to form around the vessel's side; state what became of those vessels.

A. The bark I spoke of got ashore on the beach and I guess she must have been drawing about 14 feet and she went up in about 9 feet of water and had begun to take sand in her hold. She was loaded with cement and empty barrels. We threw them overboard and got the water out of her and run kedges and got her working in the sand and then we heaved her gradually till we got her off.

Q. How long did it take you to get her off?

A. We were there about 36 hours.

Q. How long had she been in that position before you got hold of her?

A. She could not have been there over ten hours before she was reported and we went there as soon as she was reported.

Q. What appliances did you use?

A. Tugboats and kedge anchors.

94 Q. How many tugboats did you use and how many anchors?

A. The *Buckthorn* was there and I had the *Star*. I was master of the *Star* at the time, and after we hove and got her astern, then the boat I was in took hold of her.

Q. Who had general charge of it?

A. Mr. Clark.

Q. Mr. Charles Clark?

A. Yes; this is the gentleman (pointing to Mr. Clark).

Q. How far did you have to haul her before getting into water of sufficient depth to float her?

A. Considerable distance. She had worked pretty well in on the beach; she was in eight or nine feet of water; I do not remember the exact depth. She had gotten a great quantity of sand in her before we got her off.

Q. With regard to the *William*, was she a steamship?

A. She was a sailing vessel. She drifted in the same as this other bark, the *Flora*, I believe.

Q. How long did it consume to get the *William* off?

A. They got her off and got her in a floating position. She was bow on, and as soon as she began to float they undertook to turn her, and she struck again, and went on the beach, and became a total loss.

The COURT: He is capable of stating his opinion.

The WITNESS: They both were wooden vessels. The bark was about five or six hundred tons, and the ship in the neighborhood of one thousand or twelve hundred tons.

Q. Give length and dimensions of the boat.

A. The bark was 175 feet, and the ship *William* over 200.

Mr. Kirlin objected to witness's testimony, as the questions did not embody the fact that the steamer was in ballast.

Q. What would be the effect of her being stranded, lying there several days?

A. The chances are she would wash upon the beach.

Q. Then what would become of her?

A. She may be in such condition she would not be worth taking off.

Q. How can that be ascertained?

A. If she is upright, after holding a survey, it would be a
95 question for the parties who owned her, whether she would be worth taking off or not.

Q. Suppose her bottom cannot be examined?

A. You could not examine a ship's bottom on the outside if it was imbedded in the sand; you would have to come to some conclusion from the effect of the inside. If it was an English or iron steamer, you can tell from the inside whether the plates are bent in. In wooden vessels they are sealed up and you would have to open the seal, but you can locate the leaks in an iron vessel.

Q. Based upon your experience and knowledge state as to what danger or risk of the total or partial loss that vessel would incur in the situation in which she was lying, as has been described?

Mr. Kirlin objected to the question, on the ground that no sufficient predicate had been laid for that question.

A. I should consider her situation very serious. It could not become better, but it might become worse. A vessel on the beach cannot better herself, but will go from worse to worse and may become a total wreck.

Q. In the event of high winds or stormy weather?

A. That would be against her.

Q. And likely to produce what result?

A. Liable to damage her or she might become a total loss.

Q. What would be the consequence with respect to getting her off after high winds had prevailed?

A. You cannot work all the time. You would have to stop till the weather moderated, then, probable you could not run an anchor at all.

Q. Would that or not be quite probable if the stormy or severe weather were to come upon the vessel in the exposed position, of being unable to take her off at all.

Objected to as leading.

A. It might occur and has occurred. The vessel might go higher upon the beach and sustain a total loss. It has occurred upon this beach.

Q. How far is it to Velasco, or where that vessel lay?

96 A. About 40 miles from bar to bar; about 30 miles from where we are now.

Q. Are you able to state, from your own knowledge, what — the usual cost of taking vessels off under similar conditions?

A. I know of some few salvage cases and some that I have been in.

Q. Where they were taken off under contract?

A. I do not know that I was ever in a salvage contract.

Q. Do you know of the steamer *San Frisco* having been stranded?

A. Yes.

Q. Where was that?

A. On Galveston bar.

Q. Was she taken off?

A. Yes, sir.

Q. What depth of water and what size was the vessel?

A. She drifted into shoal water from where she first went on the bar fully three-quarters of a mile.

Q. Why did she drift?

A. It was occasioned by the action of the current and the quicksand. They will work right through the quicksand. You take a vessel in quicksand and let her lay there for any length of time, say she is drawing 14 or 15 feet of water, and you will find only 10 or 11 feet around her, and all the time you will think she is floating, but will only lay there wallowing.

Q. Do you know the nature of the sand around Velasco?

A. The same as here.

Q. Do you know what the cost of taking the *San Frisco* from this position was?

Objected to as immaterial and incompetent, being for the court to say from precedents and from settled adjudications in similar cases what would be the reasonable sum for taking the vessel off, and not what the witness may have heard was paid in some particular instance.

The COURT: Was that case determined by judgment or by voluntary action of the parties?

The WITNESS: By judgment.

Q. Then I will confine my inquiries to information in regard to the danger and difficulties that beset a vessel in that position.

97 The WITNESS (interrupting): I only know of one case. The Galveston Lighterage Co. took one of the New York ships off.

Objected to.

Q. I am asking you with reference to the difficulty and danger of the vessel in that position, and the certainty or uncertainty of taking her off, such as this vessel has been described to have been?

A. I do not know. You can almost take anything off the beach. The question is whether it is worth it. If it was up in the prairie it might be gotten off, but it would cost more than she was worth, and it might not be worth putting back to sea. That would be the question whether she would be worth putting back to sea.

Q. Could the cost be determined in advance?

A. That would be difficult to do.

Q. Is not that very problematic as to the time, labor and cost?

A. Yes, sir; you have everything to contend with, sea, weather and everything else. In taking a vessel off the beach you might have everything ready to get her off, and then bad weather might set in, and you would have to stand by and see everything busted up, and it would have to be done over again.

Q. It is contingent upon the weather and the circumstances?

A. Yes, sir, the weather is the principal thing to consider. You cannot do anything in bad weather, and the condition of your vessel is then much worse. You have to abandon your work during bad weather.

Q. Can there be any reasonable determination in advance how long it would take to get a vessel off?

A. It cannot be determined in advance. It is a pretty risky thing to say how long it will take to get her off.

Q. If a vessel is broadside is she more difficult to take off than head on?

A. Yes, because you would have to straighten her up first and start her toward deep water.

Q. Does storms or windy weather occur along this coast in the month of October?

A. We have fresh winds in October; it is a windy month.

98 Q. Do you speak from your own knowledge and recollection?

A. No. I do not know of any particular time. My best recollection is that disasters have occurred in October.

Q. What was it?

A. A gale of wind.

Q. Could a storm or heavy blow have been anticipated in that month?

A. Yes, sir.

Q. Does the position of the vessel become more critical or dangerous or less when beached?

A. It becomes worse. A vessel is not made to travel on land, but to float in the water.

Q. Will you state whether or not there is any reason to expect

sand to form around a vessel lying on the beach for a number of days?

A. I have known them to wallow in the sand and make a bed for themselves; the sand forms around them like a hog wallow.

Cross-examination by Mr. KIRLIN:

Q. Do you know where this ship lay?

A. Only from what I have heard during the trial what her position was. I am familiar with the jetty there.

Q. Where did she lay from what you understand?

A. To the westward of the west jetty.

Q. How far from it?

A. I do not know, only from what I have heard.

Q. How do you assume she lay with reference to the beach from the testimony you have heard?

A. From the description that I have heard, she went over the jetty bow in toward the beach.

Q. How much water do you understand she lay in?

A. About 9 or 10 feet.

Q. How much draught do you understand she had?

A. I do not know that, I paid no attention to her draught.

Q. Would not the seriousness of her position depend upon her draught?

A. Yes, to some extent. If she laid there long and they could not get her off, she had much better be on the ground, because then she would not thump and hurt herself. The way we do when they begin to get aground is to pump their ballast tanks at once so as to make them lie steady.

99 Q. When they lay in a bed of sand they are in a better position than when afloat?

A. Yes, they are better than if they were rising up and down and striking the bottom.

Q. If a vessel was lying with two feet less water at her bow than at the stern she would be in a better position than she would be rising up and down?

A. Yes, sir.

Q. She would have a better chance to get off as if sliding down a hill?

A. If she was drawing less water forward you might utilize that by filling it up with water. That would lighten her aft up higher on even keel.

Q. Which way do the worst winds come along there?

A. They blow right along there east and southeast.

Q. Would the east jetty afford any protection to the vessel lying as this vessel did?

A. If there was a very heavy surf it would have a tendency to break up, unless a severe storm came along. As long as the jetty was above water it would have a tendency to break the sea.

Q. Under those conditions, there would be less likelihood of her swinging broadside toward the beach than if she were lying toward the beach?

A. I do not know which way she would swing. There is no telling.

Q. She is less likely to do so?

A. If that vessel's stern was aground and her bow afloat she would not swing. She would not swing till she had grounded all over, then she might do so.

Q. If there is a breakwater between her and the force of the storm, is she not less likely to swing around the beach than she would be if she were lying on the east side of the jetty?

A. Yes, the more protection she has the less likely she will be to swing.

Q. Is it not a fact that your worst storms here are in the latter part of August and in September rather than October?

A. We have had storms in August and September. They are considered the windy months, so is October.

Q. Is it not a fact that the most of the storms you have here are in August and September?

A. September is our bad month.

Q. In October, in what direction are the prevailing winds?

A. They vary. We have them from the northeast and southeasterly winds. We have long spells of northeast winds.

100 Q. What effect would northerly or northwesterly winds have upon that boat?

A. It would be perfectly smooth around the bow, if she was close enough under the line where that ship was.

Q. Her position was a good deal better than it would have been than if she had been broadside on?

A. Yes, sir.

Q. And it would be more difficult to take a vessel off broadside than if she was lying head on?

A. Yes, sir.

Q. This bark that you have spoken of got on sideways?

A. She was bow in.

Q. What was her name?

A. *Flora*, I think.

Q. I believe she was lying in the same position with reference to the beach that the *Elfrida* was?

A. Just about.

Q. Was aground about the same way?

A. Yes, sir.

Q. She was lightened by taking out part of her cargo and towed off with anchors?

A. Yes, sir.

Q. Just as you have been informed the *Elfrida* was?

A. Yes, sir.

Q. Was there much difficulty about the operation?

A. There was considerable work attached to it.

Q. How long did it take?

A. Somewhere near thirty-six hours.

Q. That, including the time taking down the anchors and pulling her off, a little less than two days?

A. Yes, sir.

Q. How far did you have to drag her before she was in deep water?

A. She was pretty well in. I suppose we *drug* her a couple of hundred yards?

Q. As much as a thousand feet?

A. Yes, I should think so. She was pretty well on the beach, in about 8 feet of water.

Q. And her draught was about 14 feet?

A. Yes; I think that is what the captain said. She had cement in her.

Q. How much force was engaged in taking her off—do you know how many men, anchors put down?

A. Two.

Q. One on each side?

A. No, one behind the other.

101 Q. Do you know what size anchors were used?

A. Large anchors.

Q. What was the power used to pull her off?

A. Tug and barges to her capstan.

Q. Block and tackle?

A. Yes, and then the tug to the capstan.

Q. Were they from the ship herself?

A. Yes, sir.

Q. How many towboats?

A. Two, alongside of her.

Q. How many barges were used in getting anchors?

A. The *Buckthorn* ran anchors; she was lighter than a towboat.

Q. By one boat?

A. Yes, she ran the anchor.

Q. What kind of weather did the bark go ashore in?

A. Southeast wind.

Q. Bad or fair weather?

A. It was not blowing a gale, but right brisk weather; moderate gale.

Q. Did she go in on high or low water?

A. Do not know.

Q. How many altogether worked on her during these two days?

A. I believe I had 11 anchors with me. I suppose there were some 25 men.

Q. The name of the other boat you mentioned was the *William?*

A. Ship *William.*

Q. Wooden ship?

A. Yes, sir.

Q. What kind of weather did she go ashore in?

A. Bad weather.

Q. Heavy storm?

A. It was blowing northeasterly.

Q. Did she break up as soon as she struck?

A. She did not break up till after she got away. They got her off

and undertook to turn her, and then she went back to the beach and broke up.

Q. Was the weather bad at the time?

A. Bad enough to make her break up. It does not take bad wind to make a ship break on shoal water. She lies now about bow.

Q. Was she an old ship?

A. I did not know her age.

Q. Did she have cargo?

A. I think she was in rock ballast.

Q. How long was she ashore before she broke up?

A. I do not know. I did not pay any attention to it. I was not there after that.

102 Q. You speak of that from hearsay?

A. No, sir; I have seen her position.

Q. What kind of a ship was this *Frisco?*

A. Iron steamer.

Q. How long was she ashore?

A. Twelve days, I think, on Galveston bar.

Q. Was she light or with cargo?

A. She had cargo.

Q. Was she head on or broadside?

A. She was working across the bar sideways. She had shifted her position—the weather would shift her.

Q. She worked across the bar?

A. Yes; right lengthwise. She went out the channel about midway between the two jetties and worked up to the north about a quarter of a mile right along on the sand.

Q. She drifted about three-quarters of a mile after she got on the ground?

A. Something like that.

Q. How much water did she have around her when she stopped drifting?

A. I think at times there were 14 or 14½ feet.

Q. What was her draught?

A. I do not know what she was drawing when she started out. We allow about six inches for a vessel like that. Suppose she was drawing 15 feet, we would take her out on 15.6.

Q. She struck on the bar and drifted over?

A. She never drifted over, but right along the bar. She remained on the bar till they got her off.

Q. You do not know what her draught was on the outside?

A. I do not know.

Q. Who got her off?

A. Captain Clark.

Q. How?

A. With tugboats and other appliances. He ran anchors and used towboats. She had a great deal of water on her, and he had to stop one of her hatches and pump her out. She was getting sand in her and was in a very bad condition. She looked like a total loss for some time.

Q. A vessel's position is worse after she begins to leak?
A. Yes.
Q. Hauling off with anchors is the surest way of getting her off?
A. There is more purchase to it.
103 Q. How far did the *Frisco* have to be hauled?
A. She began to float after she got in about three times her length.
Q. You hauled her about one thousand feet?
A. I do not know exactly. I suppose something like that.
Q. Do you know of any steamer ever being broken up on the beach here?
A. No, but there have been some damaged.
Q. There have been several ashore here during your experience?
A. Yes, sir.
Q. They have always gotten off?
A. Yes, sir; all that I know of.
Q. Can you recall the names of any other iron steamers ashore near Galveston in the last fifteen years?
A. I do not know that I remember the names. We have had several ashore on the bar.
Q. Do you remember the *Masonic?*
A. Yes, very well.
Q. How much ground did she go over?
A. Not much. She was very deep. She was about 18 or 19 feet, and we took her in on Bolivar beach to pump her ballast full of water. She was on fire. She did not get where it was hard.
Q. Was she in an exposed position in case of storm?
A. Yes, sir.
Q. Suppose a vessel is in ballast and is aground two feet or more in the sand and wards off two gales without changing her position at all, what would move her in any way? The opinion you have expressed is as to the probability that in a storm she would wash higher upon the beach?
A. If she did not shift herself. If she did not get in any worse position than she was before the storm she is not any worse off if you can hold her there. She might thump herself a little, but the chances are you cannot hold her there.
Q. If she holds herself in bad gales it is evidence she is not going higher?
A. Yes, I suppose so.
Q. Didn't the *Masonic* ride out a gale of wind on that beach?
A. No, sir.
104 Q. Did you ever hear of a steamer named the *Hesper* going on the beach near here?
A. I do not remember.
Q. About 1883?
A. I do not know.
Q. Never heard of the wreck of the *Hesper?*
A. No, sir.
Q. Vessels wallowing in the quicksand are less likely to be harmed than those which do not?

A. They never better their condition. When they are in quicksand they always have a tendency to work in. They never fail to do that, when you have a current, and if you do not get them off on the next tide it takes two or three lighters to get them off.

Q. Do you mean that when she rolls off the sand gives way from her?

A. Quicksand and water, if you put a weight upon it and the weight is not steady, the object buries itself; but if you put a weight upon it and the weight is steady, it makes a fine foundation, but if there be any action it loosens up like quicksilver.

Q. So if the vessel rolled sideways the sand would give way to it?

A. Yes, sir.

Q. Do you know the tug *Josephine?*

A. Yes, sir.

Q. How big is she?

A. I suppose about fifty feet.

Q. What is her draught?

A. I do not know. Between 5 and 6 feet, I should judge.

Q. Is it not a fact that the worst winds you have here are from the east, or little north of east, generally?

A. The gales of wind we have commence in the east and work right around with the compass and wind up in the northwest. As soon as the wind is to the southward, it is bound to make bad sea, because it blows directly on the beach.

Q. Would not the fact that this vessel was hauled a distance of over one thousand feet from the water she was in to water that would float her, in about three hours and a half, indicate to you that she was not in a bad position at that time?

A. If the weather was not bad she was not in a bad position. It is a question of weather.

Q. Could you not get her off better when there is a little
105 wind?

A. Yes, it has a tendency to get her loose from the sand.

Q. Suppose you got your anchors out and heavy waters came, would you have to take your anchors up?

A. You would not have to take them up, but if you kept the strain upon them they would come right home to the ship.

Q. If you do not put a strain upon them during the storm they will be there when the storm abides, and then you can go to work again, so that your statement that you would have to go all over your work again is not quite correct?

A. You have your tackle ready to heave. Now comes along the storm, and you slacken your tackle and your ship is likely to get away, and maybe get your tackle out of your reach.

Q. Suppose you have an anchor of your own out, would not that help your tackle a little?

A. And keep a strain upon it?

Q. Yes.

A. It would be apt to come to her if there was any sea. She would either come to it, or it would go to her, in case of a storm.

Redirect examination:

Q. More particularly when the storm is blowing in that direction, with a high sea dashing upon the shore?

A. In a very severe storm it is apt to carry your tackle away. That is the trouble in bad weather—breaking your tackle up.

Q. Would not they both be apt to go in the direction of the wind and waves?

A. If her tackle held she would go to her tackle. It is a question of which would go.

Q. If the wind was from the southeast would the vessel likely go from the wind or to the wind?

A. From the wind.

Q. And be more likely to pull the tackle with her?

A. Yes, if it were severe.

Q. With regard to any protection that this jetty, extending out from the mouth of the Brazos river, would afford, would
106 that have protected a vessel lying west of those jetties against a southeast wind, or had any tendency to do so?

A. Not a bit. The jetty would be no protection with a southeast wind.

Q. Would it be any protection against a south wind?

A. No; because the wind goes further around. The only time it could be of protection would be while it was between the vessel and the wind. After passing that point the vessel would become exposed, because there is nothing to protect it.

Q. Do you know how much those jetties were above the water last October?

A. I do not know. I was there last summer, but I do not remember exactly, but think it is about two feet. The last time I saw the jetty it was under water, only the outside end of it.

Q. When you say the wind varies, do you mean to be understood that the wind does not blow more from one direction than from another—during the whole year from what direction does it blow most?

A. We claim that our prevailing winds are southeast winds, but there is no certainty about it. Last summer we had an unusual amount of southerly winds.

Recross-examination:

Q. Is it not a fact that south and southwest winds are more general than easterly winds?

A. No, sir; I have seen some severe southerly winds. About four years ago I lived in one of the passes, and for three weeks we could not get out.

Q. Taking all in all, is it not a fact that south and southeast winds are more gentle than easterly winds?

A. I do not know. We have some severe winds from the southwest, unless it is a gale. I am not speaking of a gale, but we have strong southwest winds, as strong as from the southeast. I do not

think we have ever any severe gales from the southwest that would affect a ship.

107 Mr. A. COVENEY sworn for claimants.

Direct examination:

Q. What is your name—your first name?
A. Albert.
Q. Are you a licensed pilot of the State of Texas?
A. I am, sir.
Q. How long have you been a pilot?
A. Licensed pilot for four years.
Q. What sea experience had you before that?
A. Since thirteen years old, sir.
Q. You have been mate of a vessel?
A. I have, sir, from England.
Q. On the Atlantic and in the Gulf?
A. On the Atlantic have been as master, and I was on an iron sailing vessel in the Gulf.
Q. Were you the pilot of the *Elfrida* at the time she grounded?
A. I was, sir.
Q. What was the situation of the wind and sea at that time?
A. The wind was easterly.
Q. How was the sea?
A. Moderate when I took the vessel in.
Q. Was it top of high water, or high water slack?
A. Top was flooded, but it was not high water.
Q. How much did it lack?
A. A foot of being high water.
Q. How far up the jetty did you get before the ship touched?
A. Did not get up the jetty at all.
Q. Were you not between the two jetties at the time she first touched?
A. Yes, sir.
Q. How far inside?
A. The jetties were under water, and I suppose I was about 500 feet from the end.
Q. From the outer end of the jetty?
A. Yes, sir.
Q. How much is the east jetty above the water?
A. Probably two feet.
Q. How long is the east jetty?
A. I suppose about a mile when they are out of water all the way.
Q. Is the east a rock jetty?
A. Rock and brush at that time.
Q. What happened when the steamer touched the bar?
A. I do not know that the steamer touched the bar.
108 Q. Didn't she touch?
A. I did not feel it.
Q. What was the first indication you had?

A. She did not answer her helm. Captain Burgess cautioned me when we started to mind her helm; she sheered to the westward.

Q. Did she strike the west jetty?

A. She went close to the west jetty, with bow just on the west jetty.

Q. That was on the afternoon of the 5th of October?

A. Yes, sir.

Q. How long did she remain in that position?

A. She remained in that position--I backed her off right away from that position, and she backed nearly upon the shore on a line with the jetty.

Q. Was she grounded fore and aft?

A. Yes, sir.

Q. On the side of the jetty?

A. Yes, sir.

Q. How long did she remain in that position?

A. Until about 7 o'clock that evening.

Q. What happened then?

A. I did not move the propeller at all after that because I considered the propeller in danger.

Q. What change occurred about 7 o'clock that evening?

A. The tide flooded and I ran kedge anchors. The sea moderated.

Q. Which way did you run the kedge anchor?

A. Across to the east jetty.

Q. Did you hold onto it?

A. Yes, sir; and swung the ship's head off some to the kedge anchor. I had no assistance only the kedge anchor. I could not start the engine because it was likely to disable the ship. The vibration of the ship and the swell caused the kedge anchor to drag, and she floated off on the jetty and she moved in further; consequently she had more water over the jetty on the inside than she had on the outside, because she was further in over the bar.

Q. How long was it before she went over the jetty?

A. She went over the jetty Saturday night.

Q. Did she go any further up—drift abeach Sunday morning when she went over the jetty that Saturday night?

A. I let go the anchor. I had Captain Brock run an anchor for me while I was on the jetty.

109 Q. What day was that?

A. Saturday morning. A heavy sea was running.

Q. What kind of an anchor did you take?

A. Bow anchor.

Q. Which way?

A. To the eastward.

Q. Did you haul on that?

A. Yes, sir.

Q. With what appliances?

A. With a windlass.

Q. Which one?

A. The ship's.

Q. She has four or five; which way?

A. Only one windlass; the others are winches.
Q. The windlass at the bow?
A. Yes, sir.
Q. What was the result of that?
A. We heaved the anchor.
Q. That was before she went over the jetty?
A. Yes, sir.
Q. After you got over the jetty, was there more water than on the inside of the jetty?
A. There was more water on the outside than on the inside. It is right close up to it.
Q. How much *much* more water?
A. I could not exactly tell you. I could not get my soundings out.
Q. Were you aboard when she went over the jetty?
A. Yes, sir.
Q. Were you up?
A. Yes, sir.
Q. Did you notice how far she went into the beach, went over the jetty?
A. She went well in. She had a good sea behind her to drive her.
Q. How much farther did she go in?
A. Six hundred feet.
Q. Then she rested?
A. Yes, sir.
Q. Did she change her position from that time till she was got off?
A. She was working in the sand. Where the vessel went the sand would give way and she would settle.
Q. Did she go any further ashore?
A. I do not think she did after Sunday morning, because the weather moderated.
Q. How long did you stay by her?
A. Until the 9th.
Q. Then you were there till what day?
A. I went aboard on the 17th.
Q. Was she then in the same place?
A. Yes, sir.
110 Q. What time did you go aboard?
A. After dinner on the 17th.
Q. Did they begin to heave when you went aboard?
A. Capt. Brock was heaving in the slack of the hawsers.
Q. Did you see Capt. Clark?
A. Yes, sir.
Q. Where was he?
A. At that time he was bringing anchor on derrick barge to plant another anchor.
Q. What direction?
A. To the westward.
Q. What anchors were out when you got there?

A. I saw three hawsers out. There might have been six anchors, but I know the ship's two were out.

Q. In what direction did those hawsers lead?

A. One on each quarter and one on the starboard bow to the eastward.

Q. Were the hawsers carried directly to the winches?

A. While I was there they were carried to two winches, over to one and then over to the next; both winches heaving on the two hawsers.

Q. How about the forward hawsers?

A. That was brought to the windlass.

Q. Any fall on that?

A. No, sir. With the steamer's windlass you can draw the cable in too, let alone the hawsers.

Q. Did that lead off aft, that forward line, or was it pretty near abreast?

A. It was leading from aft.

Q. How long after they began to pull before the ship was afloat?

A. The ship must have started about three o'clock.

Q. How long had they been pulling at that time?

A. You can hardly tell. You cannot designate the start in the vessel. When a vessel starts, and she is upon the beach, it is mighty slow start. The sea was coming in and she was well in her bed and would come out by jerks of about an inch at a time.

Q. Had she remained upright up to this time in the wind?

A. Yes, sir.

Q. She had her water ballast in up to the time they began to heave?

A. Yes, sir.

Q. They pumped her ballast out before they began to
111 heave?

A. I do not know whether it was out; when I got aboard they were still pumping.

Q. Had been in up to then?

A. Yes, sir.

Q. Did she get on the jetty again before she come off?

A. Yes.

Q. How did that happen?

A. I suppose the current put her there.

Q. Had there been any more on the port side than there was on the starboard side forward, would that have avoided it?

A. I do not think so, because when a vessel comes off shore afloat we could not take in the slack of those hawsers to avoid the vessel going with the current.

Q. Was she afloat when she drifted on the beach?

A. She was thumping and drifting.

Q. She was moving pretty fast?

A. Yes; because we had the propeller still going.

Q. Did you have to lay anchors again to get her off the jetty?

A. No, sir.

Q. What time did it get away?

A. I could not say. I suppose it was 7 or 9 o'clock in the evening.

Q. What water was there around her where she was stranded before they began to move her?

A. Seven feet and nine inches aft. I sounded it at the time. On top or high water it was a 3.2 tide.

Q. Had you taken any soundings when you were there during the time before you went ashore?

A. Yes; Capt. Brock, Capt. Burgess and myself.

Q. What was the water then?

A. About four feet forward.

Q. Tell us the result of your own soundings, the depth of water around her on the 9th.

Q. About four feet right forward, and there was about six feet aft.

Q. That was with the ballast in?

A. Yes, sir.

Q. At what water?

A. I could not tell you what the tide gauge was at that time, but I know it was not as high as it was when she came off. If there was three feet more water there was three feet more tide than when I sounded before.

112 Q. Did Captain Burgess consult with you as to the means of getting the ship off?

A. No, sir. I had full charge of the vessel while I stayed there.

Q. Suppose you have the anchors and cables to use that the salvors had could you have gotten her off yourself?

A. Probably so, with such a tide.

Q. Was there anything to prevent the master from hiring barges, &c.?

A. I do not know where he could have gotten them.

Q. Weren't there plenty of anchors in Galveston?

A. I do not think you could have gotten them unless you got them from the salvors.

Q. Two of the ship's anchors were on one of the cables, were they not?

A. Yes, sir.

Q. Two of their own anchors on the other?

A. Yes, sir.

Q. Were there not other ships around there from which two anchors could have been obtained?

A. That is a question. Will another man disable his ship to lend his anchors to you? Do you think any man laying out in the roads, such as the *Whitejacket*, would give you his anchors? I would not do it. Suppose a blow came up, his ship would have gotten on the beach.

Q. I did not ask you that. I asked you if there were any.

A. I do not think so. I did not hunt for any because I was on the vessel.

Q. That would have been your advice if you had been consulted?

A. Yes, if any could have been obtained.

Q. What kind of anchors were those ship's anchors?

A. Patent anchors.
Q. Steamers' anchors?
A. Yes, sir.
Q. Were they not anchors with large wooden stocks?
A. No, sir.
Q. What is the difference between patent anchors and the other kind?
A. Patent anchors can be heaved right up in the hawser up there; stock anchors have to be brought in on deck.
Q. They are movable stock anchors?
A. Not at all; they are fitted so they can turn over.
Q. They are built so they can turn over in the same way as stock anchors will?
A. Yes, sir.
113 Q. Have there been any other vessel aground in Velasco on the beach since you have been there, except the *Elfrida?*
A. Not on the beach, but on the bar, several.
Q. You say the steamer had 7 feet and 9 feet of water at the time she began to move. What was her draught then?
A. Nine feet 6 inches aft and 9 feet forward.
Q. Do you know whose lighters it was that dropped the anchors?
A. It was a derrick barge. I was aboard myself when they were working with the derrick barge.
Q. I believe you said that Capt. Brock put out one of the steamer's anchors while you were inside the channel. Was any of the steamer's anchors replaced?
A. It was a spare anchor with bow.
Q. Was that the same as the others?
A. Yes, sir.
Q. Did you see Capt. Brock assisting till the vessel was finally floated?
A. Yes, sir.
Q. Did he stay aboard all night?
A. Yes, sir.
Q. Capt. Clark also?
A. Yes, sir.
Q. All night?
A. Yes, sir.
Q. Did you see any signs of sand banking about her?
A. Yes, under the bluff of the bow.
Q. Alongside the stern?
A. Right under the bluff of the bow it had banked. The vessel was certainly settling in the sand.
Q. That was the only place the sand banked?
A. Yes, sir.
Q. Did you see any danger of sand banking as long as she laid in that position?
A. Not as long as the wind staid eastward.

Cross-examination:

Q. If the wind had changed to the southeast would it then—would there have been danger of sand banking?

A. Probably not from the southeast, because it was right in line with the ship; but if it had gone to the southwest, it would have banked probably or thrown the vessel broadside on the beach.

Q. What then about the difficulty of getting her off?

A. She might have bilged.

114 Q. And then what increased difficulty would there have been about getting her off; would it have been more or less difficult?

A. There would have been more work.

Q. Would not the result have been more uncertain?

A. It would have taken a longer time to have taken her off if she had been broadside along the beach. She would have had to be heaved at one end at the time and probably they would have had to bring her out stern first.

Q. Would have that been increased risk or danger to the vessel, by being thrown up broadside?

A. Certainly, very much so.

Q. If the wind had shifted to the southwest or southeast—do you have winds from that direction along this coast?

A. Yes, sir.

Q. Could the winds have been anticipated to have shifted to that direction at that time of the year?

A. Yes (interrupted)——

Objected to. Objection overruled.

(Continuing:) If it had gone to the south-ard it would have been followed by favorable weather, because it was working with the sun.

Q. Was there any assurance of the continuance of moderate weather; what was the condition of the weather while the vessel was lying upon the beach; any storms or high winds?

A. The weather moderated on Sunday. The captain went ashore Sunday morning, but it was not very moderate then, because the steamer hauled in the lifeboat.

Q. That was the morning she went ashore on the beach?

A. It was midnight Saturday night, or 2 o'clock Sunday morning. There was a big sea breaking upon the outside and a heavy ground swell.

Q. From that time till the 17th what kind of weather did you have?

A. She had moderate weather.

Q. Then during the time she lay there she was not entirely exposed to the storm or high wind? She did not encounter any bad weather?

A. No, but she had bad weather when she got there.

115 Q. That was a southeast wind that took her up there, or an east wind?

A. East wind.

Q. Suppose another spell of bad weather had come from the east or southeast, would it have had the tendency to drive it higher on the shore?

A. From the southeast, it would have broken her up, but from the east she would have been sheltered from the jetty.

Q. Do you have high winds from the southeast?

A. Yes, sir.

Q. At the point where she went over the jetty, were either of the jetties out of the water?

A. Yes, sir; on a line with the end of it.

Q. You spoke of having sounded on the beach and found four feet forward and six feet aft. That was on the 9th, and when she was taken off it was seven feet forward and nine feet aft. Then you spoke of a three-foot tide; was that an unusually high tide?

A. Yes, sir.

Q. Had you had any tides as high as that just before that within a recent period?

A. We had a mighty high tide at the time she went over the jetty Saturday night or Sunday morning.

Q. Do you think that was a three-foot-two tide?

A. I could not say. It was at night, but it was a pretty high tide.

Q. The tide was up at the time she was taken off; was it much higher than usual?

A. Yes, sir.

Q. How often do you have tides as high as that, at that season of the year?

A. We had that this season because of the equinoctial gales.

Q. How was it last season?

A. On the same principle, because of the equinoctial gales.

Q. Was an equinoctial gale to be expected at that season of the year?

A. Yes; in September and October it may be expected.

Q. If an equinoctial gale had arisen while she was on the beach what would have been the effect?

A. She would have gone higher up on the beach.

Q. What would have been the effect of that?

A. She may have become a total loss.

116 Q. You spoke of her settling in the sand with the sand banking on the bluff of the bow, and that she was settling in the sand her entire length. How deep did she settle in the sand?

A. About two feet, maybe.

Q. Do you know of the captain's sending for assistance to get her off?

A. I do not know anything about it.

Q. Did not consult with you?

A. No, sir; he was ashore and I was aboard.

Q. Did not ask your opinion?

A. No, sir.

Q. The course he finally pursued in employing Clark & Co., was that the proper course to pursue under the circumstances?

Objected to as immaterial and incompetent. Objection sustained.

Q. What was the best thing to have gotten her off with?

A. All I did was with the ground tackle that the ship had.

Q. While she was on the beach, after she had gotten over the jetty?

A. Yes, sir; and after she went over the jetty, and we lost an anchor and about fourteen or fifteen fathoms of chain.

Q. How many anchors did she lose?

A. Two kedge anchors and a bow anchor.

Q. That was after she went upon the beach?

A. After she was over the jetty she was going on the beach at the time she lost those anchors. I was there at the time.

Q. And you were using those anchors to prevent her from going on the beach?

A. Yes, sir.

Q. And she parted her cable and lost both anchors?

A. Yes, sir.

Q. What other way could they have gotten her off than by employing the salvors—was there any other way to have gotten her off?

A. I do not know, unless he had bought the gear himself. I suppose we could have done the work.

Q. You would have had to have some plant?

A. Yes, sir; and barges to put out the anchors, and hawsers and anchors.

117 Q. What was the condition of her machinery and engines when you went to work on her?

A. I am no engineer, and I did not consult the engineer about it.

Q. Had you done everything in your power to get her off—with what appliances the vessel had?

A. Yes, sir; it was my business to do that.

Q. I believe you stated she would not mind her port helm in going in?

A. Yes, sir.

Q. And that was the cause of her going against the jetties?

A. Yes, sir. I had five inches of water under that ship. According to Capt. Burgess' statement she was drawing 11 feet 10 inches.

Q. About 5 inches to spare?

A. Yes, sir; and it was clear of the ship, and three inches was all that was loaded to; if we were loading her up above we would have loaded say 3 inches for keel ship and 6 inches for a bilge kelson ship.

Q. You testified about your experience at sea and as a pilot, and I will ask you whether that vessel was in a dangerous position where she lay?

A. I consider she was if the wind went to the southward, but not as long as it staid to the eastward.

Q. Do you know whose advice the master took, or did he tell you anything about it?

A. No, sir; I know nothing about his business transactions.

Redirect examination:

Q. Which way was the current at the time she swung over to the west jetty?
A. To the westward.
Q. And she was lighter forward than aft?
A. Yes, sir.
Q. So that if her heel had touched a little she would have swung over just as she did?
A. It would have gone with the current anyhow, if her heel hadn't touched.

118 WILLIAM SCRIMINGEOUR sworn for plaintiff.

Direct examination:

Q. You are a pilot upon the bar of Galveston?
A. Yes, sir.
Q. For how long?
A. Twenty-four years.
Q. Are you familiar with the character of the coast and the formation of the beach along from Galveston down to the mouth of the Brazos river?
A. I know it is all sand.
Q. What are the prevailing winds in the month of October?
A. Sometimes eastwardly winds and sometimes southeast, and sometimes in the north, but the worse winds are northeast and southeast.
Q. From northeast to southeast?
A. Yes, sir.
Q. Those are the worst winds?
A. Northeast and east and southeast are the worst.
Q. In your business, have you had any experience with stranded vessels or any occasion to observe their condition when they were stranded?
A. Yes, lots of times.
Q. You heard the testimony just now of the pilot who had charge of the vessel. What would a vessel drawing 11 feet 10 inches with her water ballast, which is driven upon the beach, so that she had four feet forward and six feet aft at ordinary tide, and was settling in the sand about five feet and exposed to the southeast winds in the month of October, would you or not say she was in a dangerous position?
A. Yes, sir.

Objected to on the ground that the question did not embody the fact that the soundings were taken at high tide. Objection sustained.

Q. Is a tide of three feet two a high tide?
A. Yes, sir. Our strong tide's average is 18 inches, but the strong tide is on the full of and change of the moon; we will have more

sometimes. Three feet and a half full will bring up six foot where the wind is in the southeast.

Q. Where the wind is not blowing heavily, is two feet a high tide?

A. Yes, we have from two and a half to three feet, which is more than a usual tide.

119 Q. Suppose the vessel is grounded and is in, say, five feet and one-half forward, taking an average tide, and seven and a half feet aft, and the vessel's draught is eleven feet ten inches, and she is settled in the sand about two feet, would she or not be in a perilous condition?

Objected to on the ground that the draught is not correctly given. Objection overruled.

Q. With those figures what risk, if any, would that vessel be exposed to of loss or serious damage?

A. If there was a big tide and a gale it would bring the vessel in higher on the beach, and in doing that the vessel would likely get to leaking, and then she would sink with the sand.

Q. And then what?

A. It is a hard matter to do anything at all with them then, and we generally give them up.

Q. As a total loss?

A. Yes, sir.

Q. With the draught lessened by pumping out the ballast, so as to bring her down to a draft of ten feet, with the soundings, as I have stated, five and a half forward and six and a half feet aft, would she still be in a dangerous condition?

A. I would not consider her safe as long as she was on the beach.

Q. What would be the necessity for procuring immediate assistance to get her off?

A. I always consider it best to get assistance as soon as possible and make all arrangements to get her off, in case of a gale of wind.

Q. In what period could gales of wind be expected?

A. October is the windy month, up to about the 20th. Then the hurricane season is over.

Q. What would be the danger of a formation of sand around the vessel?

A. If the vessel is on the bottom and there is a sea or current running at all and the ship was lying so the current would sweep upon her the sand would bank up on the side the eddy is on. I have seen it bank up so you could walk upon it. A change of the current would cause it to disappear from that side and fill up on the other side. These sands move with the current.

Q. It is fine movable sand?

A. Yes, sir; the water is thick with it.

Q. The current washes it up?

120 A. Yes, sir. The vessel thumping on this sand when there is no current is like hitting a rock, but the action of the current will stir the sand up and put life in it.

Q. So the action of the current makes it move?

A. Yes, sir.

Q. You have known of vessels having gone to wreck by being driven upon the beach?

A. The ship *William*.

Objected to. Sustained.

Q. Did you know the *Alabama?*

A. Yes, sir.

Q. Was she an iron steamer?

A. Yes, sir.

Q. About what tonnage?

A. About 400 tons. I knew the boat well. She used to be engaged in carrying cattle from Texas ports to New Orleans and she went ashore there in a blow.

Q. What became of her?

A. They got her off after a great deal of trouble and expense, but she was badly damaged. If I remember right, she had her back broken nearly in two and I think they carried her to Norfolk and patched her up.

Q. How long did it take to get her off?

A. I do not remember, it has been so long ago.

Q. Do you recall the number of attempts that were made to take the *Alabama* off which were unsuccessful?

A. It is rather indistinct in my memory now, but I think some one tried it and failed in it. I know that they had quite a job getting her off. They were a long while at it and at great expense.

Q. What steamer is this opposite the Orphans' Home?

A. That was the *Arcadia*, a blockade-runner.

Q. A great many years ago?

A. Yes; she was owned by Captain Sterret. She used to run between here and Houston.

Q. Did she go ashore in a blow?

A. I do not remember.

Q. What about the *Australia?* what kind of a vessel was she?

A. She was a fine ship and belonged to the West India Company. She was laying off Galveston bar loading at that time. She was a deep-draught vessel and could not get in and took her cargo from lighters. A gale of wind came along and I think she parted
121 her chain and went ashore down the island here pretty well up because the tide was way up at that time, and some of the country there was flooded and the people had an idea she came down there to save them. When the tide was down you could get ashore from her bow.

Q. Do you know the company that took her off?

A. The Merritt Wrecking Company, of New York.

Q. Do you know at what cost?

Objected to. Objection sustained.

Cross-examination:

Q. The Merritt Wrecking Company came down and took the *Australia* off?

A. Yes, sir; I believe so, because they sent their boat there, and there was a lot of gear, hawsers and anchors and divers came down from New York on a Mallory steamer.

Q. How large a boat was the *Australia?*

A. Two thousand tons.

Q. She was high and dry?

A. Yes, sir.

Q. Do you know how long they were getting her off?

A. I do not know, but a good while.

Q. Do you remember she was there before the Merritt people got here?

A. I have forgotten the length of time. I know they had been at work and got her nearly off, and a big gale of wind came along and blew her upon the beach again, and they had to go all over their work again.

Q. The *Alabama*, how long did she remain ashore?

A. That is out of my recollection. I remember she was there, but the *Alabama* was a different vessel altogether from the *Australia*.

Q. Smaller?

A. Yes, sir; and she was not built of heavy material. She was a light-draught steamer.

Q. Do you know the case of any iron steamer having been a total loss by stranding on this coast?

A. The *Arcadia*, and one called the *Caroline*, but that was war time, and I do not think they tried to get these off.

Q. They got off?

A. No, sir; their bones are there yet.

Q. What one?

A. The *Arcadia*.

Q. That was a river boat?

A. No, sir.

122 Q. How long ago?

A. In 1864 or 1865.

Q. During the war or after?

A. During the war.

Q. Do you remember the *Hesper?*

A. There was a steamer loading with railroad iron; I do not remember whether the *Hesper* or not.

Q. The *Hesper* had salt aboard?

A. That has been so long ago I have forgotten the cargo. I know there was a ship down there and they threw a lot of stuff overboard.

Q. Do you recollect the name?

A. I remember the name and about her being ashore I cannot remember.

Q. You do not remember the circumstances or who undertook to get her off?

A. No, sir.

Q. How long have you been a pilot?

A. Nearly twenty-four years.

Q. You have known of the vessel- stranded here and the operation of getting them off?

A. Several of them. I did not pay any attention to it.

Q. That is one you did not pay any attention to?

A. Yes, sir.

Q. Twice a month you have spring tide?

A. On change of the moon we look for spring tide, but the tides are governed more by the wind than by the change of the moon.

Q. Prevailing easterly winds gives more water?

A. Yes, sir; that brings water into the Gulf, while southwest winds takes water out of the Gulf. I have seen it for about two months; south and southwest winds are about the same.

Q. They are generally light?

A. Some of them pretty strong.

Q. Your heaviest winds are south and southeasterly?

A. Yes; but we have some heavy blows from the south-ard-west-ard.

Q. So the winds from the south is generally looked upon as a sign for fair weather?

A. If it goes from the east around to the south we look for a change.

Redirect examination:

Q. If it gets around the other way?

A. Then we look for rain or bad weather.

123 Capt. W. A. HUTCHINGS sworn for libelants.

Direct examination:

Q. Your name is W. A. Hutchings?

A. Yes, sir.

Q. You live here, Captain?

A. Yes, sir.

Q. How are you engaged?

A. I am employed as superintendent of the Eighth life-saving district, embracing the gulf of Mexico.

Q. Have you a life-saving station at or near the Brazos river?

A. A mile and three-quarters east of it.

Q. Have you a life-saving station here?

A. Yes, sir.

Q. You have been a sea-going man for many years?

A. Yes, sir.

Q. How long have you been superintendent of the life-saving station of the gulf of Mexico?

A. Thirteen years.

Q. What is the nature of the beach down at Velasco just beyond the mouth of the Brazos river?

A. All the Texas coast is sandy, or rather has a sandy bottom, except right at the mouth of the Sabine Pass, where there is a kind of a muddy substance, but that only stands till the lateral current takes it away.

Q. In the life-saving service, is it part of your business to deal with vessels in distress?

A. Nothing else; that is their business.

Q. What is the character of this shore along here forty miles west with regard to it sloping towards deep water?

A. The character of the coast varies. If you go down beyond Aransas Pass, there the shore is more bold, or, otherwise, takes to deeper water closer in. Up toward Galveston to the Aransas Pass there is very little difference in the soundings.

Q. How far is it to Aransas Pass?

A. About 160 miles southwest of this port.

Q. You say that is a sandy shore and slopes out gradually?

A. Yes, sir.

Q. Are there ridges or slight bars at Velasco out from the shore?

A. Yes, sir; the current goes out gradually till it reaches the ridges; then you can step off in four feet of water and again
124 in six feet, and fifteen feet *feet* off you can be on three feet of water; that is, close in shore. The character of the bottom may be different further out. I am not prepared to say further than it is ridged.

Q. You have heard the case stated to Captain Scrimingeour as to the condition of the *Elfrida* where she lay west of the mouth of the Brazos river; will you please state to the court, based upon your own experience, what your judgment was with regard to her position being dangerous or free from danger, or what was to be expected if she remained in that position?

Objected to, as no predicate had been laid for such a question. Objection sustained.

—. I will ask you if in your position as superintendent of the life-saving station you have to deal with stranded vessels?

A. Yes, sir.

Q. What vessels have you known to go ashore?

A. I have known a great many. I remember the *Laura R. Burnham*, a total wreck. Another fine vessel called the *Ella Elliott*, a total loss, and the steamship *Hesper*.

Q. Where were those?

A. Down on Galveston island. I am speaking only of those on Galveston island. The ship *William* and the schooner *Odessa*. I cannot tell you all the details unless I refresh my memory by my wreck reports.

Q. Give us an idea of the portion that were a total wreck?

A. The *Burnham* was lost, so was the ship *William*. The *William* stranded six miles below the beach hotel. She was a full-rigged ship, wooden vessel.

Q. Any others that were a total loss that you recall, or seriously damaged along the coast?

A. The bark *Abeona*, 15 miles below Corpus Christi pass. The schooner *Welcome* was lost of stranding. The steamer *Aransas*, a twin-screw propeller about 900 tons, also stranded. It would be

impossible for me to give the number of vessels unless I look at the reports, but there have been a great number of them.

Q. In that position in which this boat lay in which it has been described, what would you say with regard to the likelihood of her being lost or seriously injured?

125 A. I should say, under certain conditions, she would probably be lost, and under other conditions she might be saved.

Q. Under what conditions would she be lost?

A. Such as a heavy southeasterly wind. I would say she was in a precarious condition, liable to be bilged by lifting up and down and filling with sand. That is probably the most dangerous position. As long as you can keep them tight there is hope, but when the vessel commences to rise up and down, she settles very rapidly in the sand, especially if the surf is heavy, and in time she will go out of sight, while wooden vessels break up and go to pieces.

Q. What, if any, is the necessity for prompt action where the vessel is stranded one thousand feet from deep water sufficient to float her?

A. Placing myself as captain of the vessel, I would be in grave apprehension as soon as she struck and would use every means to get her off as soon as possible. I believe that every minute a vessel lays on this beach inhances the danger. There is no time to delay. Even an ordinary fresh breeze causes a good surf on this beach. An ordinary breeze blowing twenty miles an hour, which is considered a strong breeze, and the wave action will break up a vessel, or drive it up higher on shore.

Q. Does that increase the hazard to the vessel?

A. Yes, sir.

Q. What would be the likelihood of bad weather in October?

A. October is considered a windy month on the north Atlantic coast. Generally in October we look for winds from the northwest, but generally our winds are northeast, varying occasionally from the south. Occasionally we have light northerly winds varying from the east around to the south.

The winds are about eastward in October. The same rule applies in spring, from northeast to south and east to southeast, or something of that kind. There is no special rule that you can apply to that, however.

Q. There is no telling when it might come from the southeast any time during October?

A. It may.

Q. In the exercise of prudence the shipmaster would protect his ship?

A. Yes, sir.

126 Q. You had your corps of men attending upon this vessel, the *Elfrida*, at the station down there?

A. Yes, sir; I have the wreck report of the circumstances.

Q. The position she is described to have been lying in, what was her exposure to the winds in that position?

A. I consider that she was in an exposed position. I understand she was west of the west jetty. I was not personally in attendance

upon that wreck. An ordinary southeast wind, lying on the bottom that would give her a chance to rise and fall, with the action of the sea, would pound her bottom very severely. The further in she would go, the less the wave action would affect her. But suppose she was lying on the ground and the wave action should lift her two feet, the concussion would have a tendency to start her rivets and start her to leaking.

Q. A heavy wind would have that effect?

A. Yes, sir.

Q. What would be the likelihood of sand forming around the vessel?

A. When the steamship *Aransas* went ashore she made a circle of 600 feet in the sand, and after nine days' wind there was a crane standing on one foot ten feet from the vessel. It all depends entirely upon the wind and the tide. They cut up many peculiar capers. I have seen vessels lifted off shore and make six or seven strikes by reason of the counter-currents. At times I have seen them lay in their beds of sand and apparently the sand would make.

Q. They would have a tendency to settle in the sand?

A. Always. When the vessel gets into the sand it forms kind of a liquid, and about ten per cent. of the water that flows in is filled with sand. I observed that from the piling in the Pagado bath-house. The sand has absolutely wore the copper from the piling. The sand is moving here all the time.

Q. Have you that wreck report with you?

A. Yes, sir.

Q. Can you give us an estimate of the value of the steamship *Elfrida?*

Objected to on the ground that no predicate had been laid for a question of expert testimony as to the value of the ship.

Objection sustained.

127 Q. You have been a sea-going man for many years?

A. Yes, sir.

Q. You have been in charge of the life-saving station for the gulf of Mexico for 13 years?

A. A little over that time.

Q. In that capacity is it part of your business to estimate the values of vessels that go ashore?

A. Approximately; yes, sir.

Q. Upon what do you base such values; from what source do you derive your knowledge and experience?

A. From a general knowledge of the vessel and information received from the captain, the parties who own her, and what she cost, taking into consideration the deterioration from age and other things.

Mr. Kirlin objected to the witness testifying to values of ship, as he had not qualified.

The COURT: I do not think Captain Hutchings has testified to his personal observation of the *Elfrida*, nor any statement made as to her service, construction or tonnage. I sustain the objection.

Counsel for libelants offered in evidence the wreck report, which is the official archive in the office of the superintendent of the life-saving station, made by the keeper in charge of that station.

Mr. Kirlin objected to it as incompetent and immaterial, and further that it does not appear to be under seal of the department, and therefore does not prove itself.

The court sustained the objection because it did not appear to be under seal.

Cross-examination:

Q. You have been thirteen years in charge of this station?

A. Yes, sir; thirteen years last March.

Q. And the coast from here down to and below Velasco you say is of the same general character?

A. Yes, sir, and further down also.

Q. And it has the same general slope?

A. Yes, sir. It approaches to the shore from Galveston
128 bar to Aransas Pass; I consider pretty much the same. There is very little, if any, difference.

Q. How far out do you have to go for 9 feet of water?

A. Approximately, I would say four hundred yards.

Q. That would be all up and down the coast?

A. Yes; that would be about the average. I have never sounded the graduation of the coast.

Q. How far out would you go for 14 or 15 feet?

A. Three-quarters of a mile, probably.

Q. Is it not a fact that in a storm the force of the waves break- a good ways from the shore?

A. Yes, sir; that is a fact, because in any ordinary gale of wind that is of any continuation broken away will extend further than the division of the line.

Q. And therefore the spent force rolls in on the beach?

A. Yes, sir; I consider our worst break is in 12 or 16 feet of water.

Q. Have you had any experience on the north Atlantic coast or east coast?

A. Only as passing by as a seaman and officer in vessels. Have never done any business there. I have sailed out of New York for many years all over the world as chief officer and second officer of the seamen on board.

Q. You do not mean to say that this coast along here is as dangerous for a vessel to strand on as the north Atlantic or Carolina coast?

A. No, not in the general acceptance of the term.

Q. That coast is much more exposed to the more violent storms?

A. Yes, sir; it has the broad Atlantic ocean to sweep against it.

Q. You mentioned several vessels that have been lost here; the *Hesper* and *Aransas* you spoke of were wooden vessels; do you now recall other steamers besides those that have been ashore here in your experience—iron vessels?

A. Yes, I think of it just now. The Mallory steamer *San Marcos* went ashore by the life-saving station.

Q. Do you recall any others?

A. Only those that have grounded here on the bar just opposite the city here.

Q. Has there ever been an iron steamer lost on this coast from stranding, in your experience?

A. No, sir.

129 Q. Every one has been gotten off?

A. Yes, sir. One was in an awkward position for ten or eleven days, and it was doubtful whether it would be gotten off or not.

Q. Has it not been the experience of persons knowing about matters of this kind that it is within a reasonable certainty that a vessel stranded on a coast like this can be hauled off by means of anchors in the ordinary weather which prevails here?

A. Yes, sir. I do not see why an ordinary vessel could not be hauled off with the ordinary apparatus if the weather is favorable, every-day weather.

Q. Is it not, therefore, that the preponderance of probabilities are in favor of a vessel getting off when she gets aground under ordinary circumstances along this coast?

A. Yes, large vessels; small ones, no.

Q. Iron steamers in ballast?

A. Yes; under ordinary circumstances.

Q. (Not understood by stenographer.)

A. On this coast, yes; on a rocky coast, no—from the fact there is more elasticity on their end—a wood vessel, it might break and leak; but if it is an iron vessel and it pounds any length of time the rivets must start, and once started she is in a position much worse than a wooden vessel.

Q. You have spoken of vessels settling in the sand and disappearing; have you known of a case of a vessel entirely disappearing?

A. Yes, sir. The *Burnham* and the *Elliott*.

Q. Those were wooden vessels?

A. Yes, sir; but very staunch vessels.

Q. Did they have cargo aboard?

A. My best recollection was that the *Burnham* did not have much cargo, except maybe a few hundred tons of canned oysters, and the *Elliott* was loaded with ice, which, of course, melted at once.

Q. In driving along the beach here is it not a fact that you see trees and other articles of various kinds lying along the beach?

A. Yes, sir; they wash up four feet high along the Velasco beach.

Q. So that they do not disappear in the sand?

A. The water action brings them up on the beach. They do not have as much displacement as a vessel.

130 Q. Is it not a fact that on the jetties pieces of rock are put upon the sand without any foundation?

A. Yes, sir.

Q. And the water is constantly beating against those?

A. Yes, sir.

Q. This does not wear the foundation of the sand away?

A. There is an allowance made for so much settling. I do not know how much, but I think that the last strata of rock would go down to the blue clay eight or ten feet, some portion more and some less, but there is certainly a settlement.

Q. Is there blue clay along this coast eight or ten feet?

A. I suppose there is, because there is blue clay opposite Galveston.

Q. How far down?

A. Ten or eleven feet there is a strata of what we call blue clay, a sticky, gummy substance we have to pass through.

Q. The jetty at Velasco is similar to this one at Galveston?

A. No, sir; entirely different from what I know. I know at Velasco they only run out a short distance. I understand that they use mattresses, and, to some extent, rock. We use rock here altogether, which gives us greater strength.

Q. You mean brush at the bottom?

A. Yes, sir, and rock above. A layer of rock, then a layer of mattress. The water action, of course, has a great deal more effect where they use mattress than it does upon solid rock.

Q. Would it not be a fact that a steamer drawing 11 feet and 10 inches, going upon the bank so she would be two feet out of water; that is, two feet of her draught, but still in seven or eight feet of water, would not settle down to any deeper draught than she would be if afloat, so long as she remained tight?

A. I do not understand the question.

Q. A ship drawing 11 feet is blown upon the beach head on in nine feet of water; is it not a fact that in staying there she would not settle below the draught which she had in deep water so long as she remained tight?

A. She would make a bed for herself to her draught, and probably a little more at times. As I said before, the sand at the
131 bottom of the vessel that is ashore is kept stirred as in a liquid state, but the bow of the vessel is made to the displacement of the vessel.

Q. Do you mean to say that she will sink deeper in sand than in water?

A. I did not say that. I mean that as soon as sand got into her she would go down deeper.

Q. She would then settle only to her normal draft afloat so long as she remained tight?

A. Yes, sir; I appear to have falsified.

Q. Did you say that the jetties, assuming that she was lying a short distance westward, would be of any protection, the wind coming from the southward to the end of the jetties?

A. It would depend on how far the vessel was in and how much the jetty was submerged.

Q. The jetties are about two or three feet under water?

A. The vessel lying to the westward, of course, both jetties would act as a breakwater, with the wind in certain direction.

Q. Do you know of your own experience that this sand will sometimes bank up, and at times will wash away again?

A. Yes, sir; and the vessel sometimes cuts up some peculiar capers in the sand.

Q. If the sand bank up in one direction, and you should get a wind and a sea from right angles, it would remain there banked?

A. Yes, sir.

Q. The vessel lying broadside on the beach and the sea coming in, will bank the sand on the inside more than on the outside?

A. Yes, sir.

Q. It will bank in the eddy?

A. Sometimes there is eddies and sometimes there is not; sometimes the water action will bank it up; if there is a counter-current the sand will bank up higher.

Q. Do you know who has done most of the salvage work along these waters?

A. Clark & Co.; Mr. Charles Clark has attended to several vessels that has been stranded, under my operation as an officer.

Q. Do you know of his having failed to get one off that he was at work on?

A. I think he failed to get a brig off here some years back. I did not know at that time whether he was the party operating or not, but I know there was a bark that had sank into the sand
132 till her decks were awash; they got her out, but she sank again and they left her and she became a total loss.

Q. That was a wooden vessel?

A. Yes, sir; I can only remember a few iron vessels.

Q. Hauling off with anchors is generally *excepted* as the safest and surest way?

A. Yes, sir; the only way I know of until she is afloat and you can get steam service.

Q. Are you acquainted with the plant of any other salvoys except that of Captain Clark?

A. Only in an indirect way—that *the* Captain Arnold had a steamer here to get vessels off.

Q. Do you know anybody else here who had heavy heaving anchors?

A. I do not know.

Q. Did you state from what direction the heaviest winds that prevailed here came from?

A. It all depends upon the season of the year. In the winter time our heaviest winds come from the north and northwest—what we call northers. In the spring we have our strongest wind from the eastward to the southeast. In that time the winds are prevailing mostly from the east and southeast and sometimes northeast.

Q. Is it not a fact that the heavy storms in the north Atlantic generally come from between northeast and east by south?

A. Yes; I expect it blows in a radius between those four points. The wind changes. It starts at northeast, going around till it gets east to southeast, when it is at its highest velocity.

Redirect examination:

Q. How would blows ranging south to southeast affect a vessel stranded as this was?

A. It would bring the sea in. The sea has a tendency to roll in on this coast, notwithstanding the wind may be parallel with it.

Q. To what do you attribute that?

A. Just merely the general swell and the general action of the gulf of Mexico; beyond the prevailing wind is rolling toward the coast to the southeast, and it seems to cross the minute it strikes shoal water and rolls in toward the beach. At the lower portion of the coast, beyond Brazos de Santiago, the norther is parallel
133 with the coast along a stretch in a direct line for 135 miles and they consider it the worst sea they can get the minute it strikes shoal water.

Q. The wind from east to southeast, the vessel in the position that this vessel occupied, several hundred feet west of the west jetty, the jetty submerged—would that afford the vessel any protection against the southeast wind, or east to southeast wind?

A. I should say she would be in an exposed position.

Q. And a nasty sea would have what effect upon her?

A. It all depends upon the staunchness of the vessel and the weather.

Q. Lying head on, with four to six feet at her bow, and seven to nine feet at her stern, with those winds coming in, what effect would it have to drive her upon the shore?

A. The surf, in nine feet of water, breaks very viciously, and it would have a tendency to lift her stern and drive her up the beach, from the simple fact that this sand becomes liquid, and any motive power the sand gradually displaces and the vessel works herself in and forms a bed for herself. She goes gradually and gradually to the shore and makes a bed for herself.

Q. With respect to the stern being in deeper water than the bow and heavy winds coming in, what tendency would it have upon the vessel lying broadside?

A. It would depend upon what angle the sea hit the vessel.

Q. Suppose it struck her on the southeast quarter of the vessel?

A. (The witness illustrated the position.) The wind blowing to the southeast the tendency of the sea would be to hit her exactly end on; that would have a tendency to throw her up.

Q. The vessel is lying head on——

A. The sea running on the port quarter with the vessel leading to the northwest would have the tendency to throw her stern to the east and correspondingly her bow to the westward, and *vice versa*, running on the starboard quarter would have the tendency to throw her stern to the westward and her bow to the eastward, unless there was some counter-current to offset it.

Q. Would there be any such winds and seas as those in a counter-current to overcome the tendency to throw the vessel broadside on the beach?

134 A. The wind from the eastward will set the current going to the southwest parallel with this coast not over a knot and

a half or two knots an hour. Under those conditions, if the sea strikes the vessel on the starboard quarter the current probably would offset her swinging. It may and may not, but would have that tendency.

Q. If upon the port quarter?

A. If upon the starboard quarter, with westward current, it would have the tendency to counteract that.

Q. If it struck upon the port quarter?

A. It would slew over rapidly till she became broadside.

Q. You were asked about the distance in heavy wind the waters broke. I understand you to say three-quarters of a mile in 14 or 15 feet deep?

A. In answer to the inquiry of when the waters broke, I said beyond the division of the line.

Q. So, having spent its force, it would pan out from 5 to 9 feet?

A. I consider that the most vicious break on this coast is between 10 and 16 feet. In a gale of wind it has great force, even up to 7 feet.

Q. You were asked about the vessel displacing the same sand as she would water. Do you make no allowance in that for the sand banking against her?

A. When I made that answer it was under the condition of the vessel lying straight in her bed. I said that even less sand banks around the vessel. The general tendency is to bank on the inside shore and to give them a lift off shore.

Q. Suppose they are lying head on the shore in the direction of the wind and waves from either quarter, what effect would that have upon her with respect to sand banking?

A. Certain currents would have the tendency to bank it.

Q. Then, even with the most experienced, the action of the sand in this respect is inexplicable?

A. Yes, sir. I have known vessels that went ashore that made a circle of 600 feet of her own volition. She made a complete circle of 600 feet in the sand. That was the steamship *Aransas*, and, as I said, on the morning of the 6th day she was lying broadside to the beach with six feet of water on the Gulf side or off-shore side, and a foot and a half or two feet in the in-shore side. As I
135 illustrated, there was a crane standing ten feet from her on one leg.

Q. You spoke of Clark & Co. having done the bulk of the salvage work here for the past years; is it not a fact that they have the most complete plant and equipment for that purpose along this coast?

A. As far as I know; yes, sir. I have never made inquiry with reference to those matters, but it is my understanding from the work they have done, and from their always operating on vessels, I suppose they have the best plant in this section of the country.

Q. Is Captain Clark a man of experience in sea-going matters in regard to vessels?

A. I have always considered him a practical man; understood his business thoroughly.

Q. The vessel that you spoke of—did you mention the *McDowell?*
A. No, sir.
Q. You spoke of some bark?
A. Barkentine.
Q. You recollect the *McDowell* going ashore at San Louis pass?
A. I remember the circumstances, but it is not clearly in my memory now.
Q. It went ashore in San Louis pass, in front of Pharlan's house, in 1870, but that was before your time?
A. Yes, sir; I do not remember the circumstances of it; only from hearsay.
Q. Do you know of a vessel being ashore along the San Pedro island along this coast?
A. I know there is now a mahogany schooner below Corpus Christi pass, between that and the entrance of Brazos de Santiago; but only from hearsay.
Q. You have no personal knowledge of it?
A. It is outside of the operation of my district where it was possible to get at her.
Q. You spoke of no iron vessel going ashore having been destroyed—have you known of any seriously damaged?
A. The *Aransas* was very seriously damaged.
Q. You say if they start their rivets they are worse off than a wooden vessel?
A. Yes, sir; because they are harder to get at. You can repair a wooden vessel, because it is spongy.

136 Q. I will ask you this question: Is it a fact that Velasco is in telegraphic communication with the United States and Europe?

A. I do not know, sir, outside of the local telegraph office. I know not from my own experience, having had no occasion to send European messages.
Q. Did you know Mr. Sorley in his lifetime?
A. Yes, sir.
Q. Do you know how long he has been dead?
A. Only a short time; about six or seven months.
Q. Do you know anything touching his experience and qualifications regarding vessels and marine matters generally?
A. Only in a general way. I know he has occupied a position during the time he lived here, about twenty-three years, as underwriter's agent; and, holding that position, I expect he was familiar with such matters.
Q. Who is the principal marine adjuster of this place and around here?
A. I could not say.
Q. Since you have known Mr. Sorley he has been the marine insurance agent?

Objected to, as the captain does not know exactly what his position was.

The COURT: It has been developed that Mr. Sorley represented Lloyd.

Objection sustained.

Recross-examination:

Q. How much of a place is Velasco?

A. It used to be larger than it is now; probably at that time it had a thousand people.

Q. Are there any salvage facilities in Velasco that you know of?

A. No, sir; none that I know of.

Q. This steamer *Aransas* went ashore in a hurricane?

A. No, sir; in very moderate weather.

Q. How long was she ashore?

A. Eleven days.

Q. Where?

A. On the south breakers, at the entrance of the Brazos de Santiago harbor.

Q. How far away is that?

A. Two hundred and fifty miles from Galveston.

Q. That is beyond the limit you spoke of where the beach is the same as you say it is here?

A. Yes, sir; these floods show that the Texas coast is similar.

137 Q. She was broadside?

A. She was all kinds of positions.

Q. You saw her?

A. I was aboard of her.

Q. How large was she?

A. About 800 tons, I should judge.

Q. Side wheel?

A. No, sir; double propeller, twin screws.

Captain JAMES MCDONALD sworn for libelants.

Direct examination:

Q. You are one of the pilots of Galveston?

A. Yes, sir.

Q. How long have you been engaged in that capacity?

A. Twenty-one years last month.

Q. Have had experience on vessels in going to sea?

A. Yes, sir.

Q. How many years prior to becoming a pilot?

A. I went to sea in 1852 and in 1874 I became a pilot.

Q. Are you familiar with the general nature of the Texas coast from here forty miles down?

A. Yes, sir. There is not a part of the Texas coast that I have not been on.

Q. You have been in Velasco port?

A. Yes, sir; before there was any jetties there.

Q. You are familiar with the general nature of the coast along there?

A. Yes, sir.

Q. Have you known vessels to be stranded along this coast?

A. Yes, sir; a great many of them.

Q. In what relation does your knowledge of that arise from?

A. Personal observation and by going to them that needed assistance. On one occasion I was captain of a vessel that stranded at Aransas Pass.

Q. A vessel that is stranded as this one shows to have been, with bow on, *in* the water at the bow being four to seven feet, according to tides, and from seven to nine feet at the stern, and bow on, at the shore just beyond the mouth of the Brazos river, the vessel of about eleven hundred tons, an iron vessel, in the month of October, and a thousand feet from water of sufficient depth to float her, and
138 imbedded in the sand about two feet, what would you say would be the likelihood of her being in danger or otherwise?

A. It would depend upon the weather.

Q. You have reason to expect what kind of weather at that time of the year?

A. I never seen two Octobers in which there was the same kind of weather.

Objected to as no predicate had been laid.

Q. Is the weather uncertain in October?

A. Yes, sir; we had two hurricanes here in October, that I know of.

Q. From your knowledge and observation of the vessels that have been stranded, and under such conditions as I have described, if bad weather should come on, what would the results be?

Objected to. Objection overruled.

A. I would say that if bad weather came along it would bring her up higher, and it would then cost three times as much money to get her off, and you may never get her off. It would depend upon the position she was in and whether or not she got to leaking. I know the bark *Houston* went ashore with cargo and we got the cargo out of her and worked at her two weeks. We got the ship about off and a gale of wind came on and she went on again and broke her back. Mr. Hunt, who bought her, *and* spent about $30,000 to get her off, and finally lost her, a total wreck.

Q. Do you know about the *Australia*?

A. Yes, sir.

Q. Where did she beach?

A. A little below the Brazos.

Q. That would be within 30 or 40 miles?

A. Yes, sir; within six or seven miles of Velasco?

Q. What became of her?

A. After she was there about two months she was gotten off.

Q. By whom?

A. New York Wrecking Co.

Q. About how long?

A. About two months she was there, but I do not know how long they worked. She arrived in tow of the tug that was working on her five days after the *City of Waco* was burned.

Q. Do you know what it cost to get her off?

A. I do not know, except from hearsay.

Q. Do you know about the bark *McDonald?*

A. Yes, sir.

Q. She went ashore in the same neighborhood?

A. Yes, sir; 15 or 18 miles this side of her.

139 Q. Same character of shore?

A. Yes, sir.

Q. Do you know who got her off?

A. I do not recollect.

Q. You remember a northern company coming down for that purpose?

A. I was going to sea at the time as master of a vessel.

Q. Do you know what kind of a vessel she was?

A. She was a bark; I have been aboard of her.

Q. Was she staunch and well built?

A. Yes, sir.

Q. About what tonnage?

A. About 900 to 1,000 tons.

Q. Do you know what finally became of her?

A. My best recollection is she went to pieces. It has been a long time ago. I was a witness on that occasion. I went up as an expert to prove the claim. I do not recollect the circumstances of getting her off, because I went away afterward.

Q. Do you know what persons have done salvage work here in Galveston and Velasco?

A. Captain Clark has attended to most of it since I have been here. The Galveston Lighterage Co. have done some. They took the *San Marcos* off by lighters, anchors, &c.

Q. How long did they occupy in taking her off?

A. She had cargo, and I think they took five lighter-loads out. I think she was there two or three days.

Q. Do you recollect the depth she was in?

A. Only about 14 feet when she went on, and they took five lighter-loads out of her before they got her off. She went ashore in foggy weather.

Q. Is Captain Clark a capable and experienced man in that business?

A. Yes, sir; as far as I know, he has had more experience than any man in Galveston.

Q. What would you say with regard to the likelihood of sand forming around the vessel that was stranded, and had settled in about two feet of sand?

A. It would depend upon the current and the sea.

Q. What conclusions could you come to as to the currents and the sea in advance?

A. You could not do so, unless you knew the weather you were going to have.

Q. May bad weather be expected in the month of October?

A. Yes, sir. We often have bad weather in the month of October, and nearly every other month in the year. I have seen a hurricane here in the month of June.

140 Q. Do you know this vessel, *Elfrida?*

A. I have seen her in this port.

Q. Have you any knowledge of her value?

Objected to. Sustained.

Q. What is your experience in judging the value of vessels?

Objected to. Objection sustained.

Q. Do you have any occasion to estimate the value of vessels?

A. I have built three vessels in my experience and helped to pay for two; the largest, though, was only $3,200.00.

Q. Wooden vessels?

A. Yes, sir.

Q. American vessels?

A. Yes, sir.

Q. In the course of your business as pilot, do you or do you not have occasion to learn in a general way the usual values of vessels?

A. Only from what the captain would tell us; beyond that I could not say. Two vessels may be of the same tonnage, and one may cost double the other.

Q. You have been aboard the *Elfrida?*

A. Yes, sir; at the wharf here, when she came back from Newport News to reload.

Q. Can you give an estimate of her value, based upon your knowledge and experience?

Objected to. Objection sustained.

Q. Do you know Mr. Jas. Sorley?

A. Yes, sir; for 35 years.

Q. How long did he act as Lloyd's agent here?

A. Ever since I have known him he has always had something to do with every vessel on the beach that I knew anything of.

Q. In position to have acquired considerable experience and qualification?

A. Yes, sir; he has had long experience in that line of business.

Q. Who was looked upon as the best-informed man in marine-insurance matters, marine adjustments and matters of that kind?

Objected to as immaterial.

The COURT: What is the question?

141 Q. Do you know who was regarded as the best-informed man and had more experience in matters of marine insurance, loss and damage of vessels, &c.?

The court sustained the objection.

Q. I will ask you whether or not you know what his reputation was for integrity?

A. If he was not an honest man there was not one in Texas. I have been on four surveys with him.

Q. What do you mean by that?

A. I mean that when a vessel has been wrecked a survey must be had. He has always been an able man, and has always worked in best interest of the ships.

Q. You say he was an honest and upright man?

A. Yes, sir.

Q. The question I want to ask is whether or not in October of last year, it being in evidence that he went to Velasco and inspected this vessel and conferred with the captain and was in telegraphic communication with the owners and the Lloyds, whether or not at that time he was mentally and physically capable of transacting business?

A. He was sick, and had been feeble for some time, but mentally he was all right.

Q. He was an elderly man?

A. He was seventy-five years of age, and has since died.

Judge Lockhart made the statement in court that he was about to take the deposition of Mr. Sorley, and Mr. Stubbs handed me interrogatories propounded by himself, and immediately crossed the interrogatories in less than two days after he handed them to me, and returned the direct and recross interrogatories to Mr. Stubbs.

WALTER HANSCOM, United States commissioner, testified that he went to the house with Mr. Sorley to take his deposition, and he was in a very feeble condition, and his wife consulted him and said that he was not able at that time to answer the questions, but to call again, which he did several days later, and he was not in any better condition, and then they said to leave the matter and he would probably be in such condition as to be able to answer them, and his son was to notify me.

142 Q. That was about a month before his death?

A. Yes, sir.

Q. What month was that in?

A. I do not remember exactly.

Q. When did he die?

A. I think it was in May.

Mr. MCDONALD cross-examined:

Q. What has your experience been with iron steamers stranding on this coast; how many have you known of your own knowledge?

A. 4 or 5 ships.

Q. Do you know their names?

A. Steamer *Mary Wells*, at Aransas Pass. On St. Joseph's island, steamer *Raindeer*, iron steamer; she was lost there. Then I know the *Australia*, the *Hesper*, the *San Marcus* and the *Guadalupe*.

Q. Were you personally on these that you mentioned?

A. No, sir; but I know they were on the beach.

Q. I would like to know what your actual experience has been with iron steamers?

A. I have had a good many years' experience on board.

Q. This is a limit of your experience?

A. Yes, sir.

Q. As to all the other vessels, your testimony has been from hearsay?

A. Yes, sir; I was not down there on board of them.

Q. You did not see them with your own eyes?

A. Yes, sir; I saw the *Hesper's* position and the *Alabama's* position on the island.

Q. That is a vessel that went ashore during the war?

A. No, sir; she went ashore in 1875. It was not Sims' *Alabama.* The war ships were the *Arcadia* and the *Denver* which lay upon the beach now.

Q. It is a more difficult matter to get wooden vessels off than iron steamers, generally, is it not?

A. It depends upon circumstances. The wooden vessels have to work with capstans and windlass, while the iron steamers have appliances for heaving when they have steam up.

Q. What would you think of a vessel's position after she was driven up within 400 feet; would it be better or worse than it would be if she were 1,500 feet from the shore line?

A. It would depend altogether upon the wind and weather and sea.

Q. In severe weather?

A. If she was a loaded ship she would not have gotten up so far.

143 Q. Which would be in the worst position in a storm?

A. The one closer to the beach would go up higher. I do not think that there would be any difference in them.

Q. Do you think the one already up higher would be carried further out than the one further out at the time of the storm?

A. Yes, sir; if the sea and storm rose sufficient to drive her up she would be further in and harder to get out to deep water.

Q. Who else besides Capt. Clark has appliances sufficient to get a steamer off?

A. I do not think that anybody has except the Galveston Lighter Co. Capt. Clark has done about all that work, except when the New York Wrecking Co. came to the relief of the *Australia.*

Q. Is the Galveston Lighter Co. the company Mr. Moller is interested in?

A. Yes; I think he has some stock in it.

Q. What kind of lighters do they use; steam propellers?

A. Yes, sir, and barges.

Q. Have they heavy anchors?

A. Their own anchors are not heavy.

Q. Has anybody else here heavy sea anchors except Capt. Clark?

A. No, sir; I do not think so; because they are not an article generally used and people do not care to invest in them.

Q. Mr. Sorley had been ill and feeble some time before this?

A. He had been ailing six or seven months before that. I called upon him on two or three occasions. He was in very feeble health.

Q. There have been testimony here to the effect that several large steamers have gone ashore within the last ten or fifteen years within forty miles of here without being gotten off successfully?

A. Yes; I do not exactly remember.

Q. Do you remember the case of the *Hesper?*

A. Yes, sir.

Q. Did you see her position?

A. Yes, sir.

Q. How close was she to the shore?

A. She was in about 11 feet of water.

Q. Whereabouts was she?

A. About 8 or 10 miles down the island.

144 Q. Was she broadside on?

A. Not when she first went on, but she got in that position before they got her off.

Q. Was she in a critical position?

A. I considered any vessel on the beach in a critical position.

Q. Did you consider the *Hesper* in great peril?

A. Yes, sir. She went ashore in foggy weather. She took out part of her cargo and Captain Clark got her off.

Q. She was gotten off by anchors?

A. Yes, sir.

Q. Captain Clark, the salvor?

A. Yes; I think so.

Q. Do you know how long he was getting her off?

A. Two or three days from the time they first started.

Q. Do you know how much of a plant he had at work?

A. I do not exactly know. He had a few schooners down there.

Q. How many men?

A. I do not know how many, but a great many. A whole lighter-load went down there.

Q. A good many anchors?

A. I could not say how many anchors.

Redirect examination:

Q. The *Hesper* had a heavy cargo?

A. Yes, sir.

Q. Taking it out lightened her?

A. Yes, sir.

Q. Had sand banked around her?

A. I do not know for certain.

Q. Do you know whether or not she had settled in the sand?

A. I never seen one in that position that did not settle more or less.

Q. What would be the probability of sand banking around a vessel, speaking from your own observation?

A. If she lay broadside, with current running, the sand will bank three or four feet on the lee side, and on the other side when the tide changed.

Q. When *there* are broadside to the current, the ship lying head on right angles to the shores, is she apt to be broadside to the current?

A. It depends upon the way the current is going. If they would break way out and the current was settling from the east there would not be much.

Q. Don't we have currents from the southwest?

A. Yes, sir; and then it turns the other way.

145 Q. That would place the vessel in danger of being banked on one side?

A. Yes; and whenever the sea came in she might go broadside.

Q. What effect would breakwater have with the current coming from the westward?

A. None at all.

Q. It is not certain to bank up against the breakwater when the wind comes from one way or the other?

A. Yes, sir; the sand is banked alongside of it.

Q. The sand has a tendency to form against them?

A. Yes, sir.

Q. Are there a number of spars running out in the Gulf at right angles—I am speaking of those small ones along the east coast?

A. The sand banks upon one side and then upon the other. They will go down under water finally. Our breakwater here went down about seven feet.

Q. You speak of sand forming on those jetties; is not the water there very much shoal water?

A. Yes, sir; there is about two hundred acres of land made there where there used to be nine or ten feet of water.

Q. It is on this side of the south jetty?

A. Yes, sir.

Capt. F. JOHNSON, for libelants.

Direct examination:

Q. What business do you follow?

A. Master pilot on the coast of Texas, and also for the mouth of the Brazos river, and acting pilot at the mouth of the Brazos river for three or four years.

Q. Were you there in the fall of 1894 as pilot?

A. Yes.

Q. Had been pilot for several years?

A. Yes, sir.

Q. Are you familiar with the coast?

A. Yes, sir.

Q. Particularly at the mouth of the Brazos?

A. Yes, sir; every bar on the coast.

Q. How were the jetties October last year with respect to the distance they stood out *about* the water?

A. When the jetties were first built they were just a mile from shore; two thousand feet from the end in October of last year. There was about ten feet of water on top of the sea — and west of the

jetty. There was about ten feet on the west and about nine
146 feet on the east. The rock had settled and the brush too, if it has not decayed, has settled in the sand.

Q. Did you see this steamer after she went ashore?

A. Yes, sir; Sunday afternoon she was high and dry on the beach, heading off the sea beach.

Q. What position did she occupy with respect to the jetties?

A. Very nearly parallel with the jetty, a little south-ard at that time.

Q. How far west of the west jetty?

A. About 300 feet.

Q. Was that west of the jetty submerged?

A. Yes, sir.

Q. How was the east jetty?

A. The stern of the steamer was in line with the end of the west jetty. That was out of water and the east jetty was out of water about one hundred feet further out.

Q. About how far out of water?

A. About one foot out of water, at the extreme end.

Q. How far between the jetties?

A. Five hundred feet.

Q. Then she was north of it, west of the east jetty, and that was about one foot above water?

A. Yes, sir.

Q. How did the vessel lay, with respect to the bow and stern?

A. Her stern was laying about south from the beach.

Q. The wind coming from the southeast-by-east would strike her on the starboard quarter?

A. Yes, sir.

Q. Did she have good weather when she was lying there?

A. I think we had some strong winds there during the time she was lying there. I know we tried to get alongside of the vessel with a tug, but could not do it.

Q. Was that before you tried to haul her off?

A. Yes, sir; and before they tried to get her off.

Q. Did the captain tell you anything about it?

A. I took the captain to Velasco in my boat and he used to tell me what the captain of the *Lizzie* and *Whitejacket* advised him to do.

Mr. Kirlin objected to the witness stating the conversation between the captain and third parties.

The court overruled the objection, saying that where the charge was fraud or that he was overreached or misled it is competent to show that he had outside advice, if you can prove it.

147 The witness, continuing, said: The *Whitejacket* was there first, and the *Lizzie* came afterwards, during the time she was ashore. The captains of both vessels advised him to run kedges. He had no facilities for running anchors, and he done so.

Q. Explain the difference between a kedge and an anchor.

A. A kedge is an anchor weighing about 250 to 500 or 600 pounds

and an anchor is something heavier—from 3,000 pounds up—that is, a ship's anchor. Of course, when you speak of a boat's anchor, it is a small one.

Q. You say she had no facilities for running heavy anchors?

A. No, sir.

Q. What facilities were needed?

A. Heavy barges, something to carry the anchors on, something to get the anchors overboard with. He said, I have already done so and my kedge would not hold, and that he could not possibly do anything with the wrecking company to get her off. He was very anxious to get the vessel off, and so was I, as I was interested in property there, and my occupation was there.

Q. What did he state the masters of the *Lizzie* and the *Whitejacket* told him to do?

A. Run kedges and make an attempt to get the vessel off, and he run on kedges and then came back They would not hold; they were too light.

Q. Did he put out any large anchors too?

A. No, sir; I think not. I think Brock put out two during the time.

Q. Before Capt. Clark took charge?

A. Yes, sir; before he came down.

Q. What became of the anchor Brock put out?

A. That came back home too.

Q. At any rate, they did not move the vessel?

A. No, sir.

Q. Describe the situation of the vessel.

A. She lay head on the beach.

Q. How far from the beach?

A. About four or five hundred feet.

Q. How far from deep water sufficient to float her?

A. The beach slopes very gradually, owing to the jetty
148 being there where the vessel was laying; before the jetties was built there was 10 or 11 feet; after the jetties was run out the sand has banked up between the jetties, and when I sounded there was five feet at her port hatch, and afterward about four feet. There is always a wash and probably there was less than that away from our soundings, and when I started out I went 400 before I struck 8 feet; then I knew it was hopeless.

Q. What was she drawing?

A. According to the captain's statement, 11.10.

Q. What danger, if any, was she in in the position she lay?

A. I think she was in danger of going higher up. She was in danger of "brojing," getting around broadside, and by brojing the pressure might be so great on her stern that she might break her share and rudder, and then she would be disabled.

Q. What would be the circumstances of her being brojed or driven upon the shore higher, with respect to any damage that it might do her, or increase the expense of getting her off?

A. It would increase the expense double what it would be otherwise. A vessel lying in that position, one current and sea might

bank sand around under certain parts of the vessel and wash away from another part of the vessel, which would strain the vessel and apt to start her plates.

Q. Then what would be the consequence?

A. She would bilge and the sand would get into her and settle down.

Q. Any probability of her being seriously injured?

A. Yes, sir; when she breaks her rudder or starts her plates, she is disabled.

Q. A southeast wind would act how?

A. It would drive her upon the beach higher, because the motion of the vessel against the sand would drive her up.

Q. Did the captain ask your advice?

A. Not particularly. I told him if I was him I would do all I could to get the vessel off, and get anchors out if he could get them.

Q. Do you know on the 9th, when he was on the beach, four days after he went on the jetties, do you know of his advertising for tenders?

A. I did not.

149 Q. What is the first you knew of Captain Clark being employed to take her off under contract?

A. The very day he came. I think he came Sunday.

Q. That was the 14th?

A. I think so. That is the first I heard of it. I know Captain Clark was there when the vessel first came ashore.

Q. Then he came down a second time?

A. The second time I heard he was there was when he came down to go to work.

Q. You saw him the first time?

A. Yes, sir; he came aboard. It was very rough, and I was very much surprised to see him come at all such bad weather.

Q. Did you value the plant he had working to get her off?

A. It would be about $35,000 or $40,000.

Q. Did he use anything besides his own plant?

A. Yes, sir; he had one of Mr. Brock's lighters there and a derrick barge which belonged to the syndicate under Captain Brock's control.

Q. Those he had in use also?

A. Yes, sir.

Q. Was his plant exposed to any risk?

A. His tug was. I was on her myself at the time. He asked me to get on the tug, as I was more familiar with the place than the captain, and she was thumping hard.

Q. What did you go into the stern for?

A. I went there to take the light in as close as possible.

Q. The lighters could not take those in?

A. No, sir.

Q. And you took them in as close as you could and the tug would thump upon the bottom?

A. Yes, sir.

Q. What risk is that?

A. Breaking to pieces.
Q. You took the lighters in sent to put the cables in?
A. Yes, sir; and also ran anchors and cables.
Q. Did you have any interest in this contract?
A. No, sir.
Q. Did the masters of the other two steamers have any interest in it, as far as you know?
A. No, sir.
Q. What about the winds along there in the month of October?
A. It varies. Storm wind generally comes out east to northeast, and goes around to the south-ard. It never stays in the east very long.
150 Q. Could you reasonably have anticipated bad or stormy weather at that time of the year?
A. Yes, sir. September, October and August is always looked for bad weather, and we are very careful when we travel along the coast.
Q. Did you see Mr. Sorley down there?
A. Yes, sir; I saw him down there looking at the vessel.
Q. Who was he with?
A. I do not remember. I think he came down in a steam-launch.
Q. Were you there during the operation of taking her off?
A. Yes.
Q. How long did it take them to arrange the plant, take out the anchors and put everything in readiness for heaving?
A. I was on board the tug *Josephine* five days and a half, during which time we were running anchors out and hawsers and getting ready generally to get the vessel off.
Q. What did you do with her after you got her off?
A. We towed on her about two hours and a half.
Q. After she got afloat?
A. Yes, sir.
Q. How long did it take them to get her off?
A. From two o'clock till about half past eight o'clock.
Q. That would be in the neighborhood of six hours?
A. Yes, sir.
Q. How long were you in getting everything in readiness to do that?
A. About three days and a half or two days and a half. I do not know exactly.
Q. You were on board of the tug and engaged five days and a half altogether?
A. Yes, sir.
Q. Where did you leave her?
A. The vessel after she came off, we floated her out to sea, and I asked if any further towing was required and I was told no, but to come back in the morning. I went in and came back next morning and towed the vessel in the Brazos river alongside of Quintana. We did that because we did not know what injury might have done to the rudder. She might have refused to steer or something of that kind.

Q. How many men did Captain Clark have on that vessel?
A. About forty all told.

151 Cross-examination:

Q. Have you had any experience before this with iron steamers stranded on this coast?
A. No, sir; not iron steamers.
Q. Do you know whether the vessel drifted up in this weather that you spoke of?
A. Yes, sir; she drifted up.
Q. Do you think after she became imbedded in the sand two feet that she would move in ordinary water?
A. Yes, sir; there was always a motion unless it was very smooth whenever there was a slight sea.
Q. Did you ever have any other experience in any other waters with iron steamers?
A. No, sir; but right on this Galveston bar I have seen it.
Q. Did you see Brock put down this anchor that you say come home?
A. No, sir; I did not see him.
Q. You do not know whether he did or not?
A. Yes, sir; I might say he did, because I saw the cable there.
Q. You do not know Brock did it?
A. Yes, sir; I saw his boat there.
Q. Don't you know the anchor left there was dropped by the pilot when the vessel went in?
A. I have not mentioned that at all.
Q. It is a bow anchor?
A. Yes, sir.
Q. It is the only anchor beside the kedge that ship lost—did you say she lost any more?
A. I did not say that. I said she hove the anchors home.
Q. You say you saw Mr. Clark Sunday?
A. Yes, sir.
Q. How long did you see him there at that time?
A. He came in on Sunday and went to Velasco and I did not see him any more till the second time he came.
Q. What time was that?
A. That was Sunday.
Q. You say you had been at work five days before you began to haul her off?
A. I said five days and a half, including the time we were getting things in shape.
Q. Did you not say you worked on the *Josephine* five days and a half up to the time she was pulled off?
A. I said I was engaged on the *Josephine* five days and a half.
Q. Doing what?
A. Running anchors and getting ready.
152 Q. That includes all you did before and after?
A. Yes, sir.

Q. How many days were you working on the *Josephine* before you pulled her off?
A. About three days or two days and a half.
Q. Was it one-half?
A. No, sir; more than that.
Q. Did you not get her off on the second day after you put down the anchors?
A. I do not remember the time. I was on the *Josephine*. I remember the time I was paid for.
Q. Did Mr. Sorley come down on a vessel?
A. No, sir; he went on the beach and viewed the vessel.
Q. Did you say how he came down to Velasco?
A. On a little launch from Velasco to Quintana.
Q. From Galveston to Velasco?
A. I do not know.
Q. Where did you leave her?
A. At Quintana.
Q. You have been subpœnaed in this case?
A. No, sir.
Q. How did you happen to be here?
A. Had business here. I have to stay here ten days more.
Q. Waiting for this case?
A. No, sir.

Redirect examination:

Q. Did your own opinion correspond with the advice given by the masters of the other vessels as to the necessity for prompt action?
A. Yes, sir. Where that vessel struck there is only two feet of water today.
Q. Why is that?
A. Sand banked up.
Q. Caused by the jetties in that neighborhood?
A. Yes, sir.
Q. The water has been shoaling since?
A. Yes, sir.
Q. There is some sand forming to the southeast of our jetties?
A. To the southwest.
Q. Southeast is right straight out?
A. Yes, sir.

Recross-examination:

Q. Is there any inside the end of the jetties at Velasco?
A. Right up from the solid bank.

153 W. V. JUDSON sworn for defendant:

Q. Are you connected with the United States engineers' office at Galveston?
A. Yes, sir.
Q. Have you a table showing the tides on the bar during the month of October, 1894?

A. Yes, sir; I have the office record.

Q. Will you please state the high tide during the month of October, each day, beginning with the 5th?

A. On the 5th it was 2.7, on the 6th it was 2.9, on the 7th it was 3.1, on the 8th it did not reach a maximum, but the highest point on that day was 3 feet, on the 9th 3 feet at midday and at midnight on the 9th it was 3.20 (3 feet and two-tenths), and on the 10th the highest tide was 2.5, on the 11th it was 2.6. In some cases we have the large declination tides, that is, one a day; then the intermediate tides, which we call one a day, and then the smaller declination tides, when we have two a day.

Q. Which one did you go to on the 11th?

A. The smaller declination tides, so that on the 11th we have two highest, 2.6 and one 9; on the 12th again two highest, 2.4 and 2 feet; on the 13th we have two feet and one-tenth and two feet and one-tenth; on the 14th we have 2 feet and 3 feet; and now we come again to one a day: on the 15th we have 2.7, on the 16th 2.7, on the 17th 2.6, on the 18th 2.6, on the 19th 2.6, on the 20th 2.9, on the 21st 2.5, on the 22nd 2.4, on the 23d 2.1, on the 25th 1.9 and 1.7, on the 26th 1.6 and 1.7, on the 27th one foot and 2.30, on the 28th 2.8, on the 29th 1.9, on the 30th 1.9 and on the 31st 2.4.

Mr. Kirlin offered in evidence the tracing on the tide record on the bar, with leave to substitute a copy, Judson's Exhibit No. 1.

(Here follows diagram marked p. 153*a*.)

Cross-examination:

Q. Does that show the condition of the tides near the mouth of the Brazos river?

A. Not necessarily.

Q. How could those tides have differed from the tides on the Galveston bar, of which this a record?

A. The tides here are largely due to the winds; the high
154 tides are sometimes higher and the low tides are higher, depending upon the winds. The difference in the winds between here and Velasco might make a difference in the tides, but the nearness of the two points would not make much difference.

Q. From bar to bar, do you know how far it is?

A. No, sir.

Q. Say forty miles would make some difference in the winds, that would make a difference in the tides between the two places?

A. Yes, sir.

Q. Do you keep a gauge at Velasco?

A. No, sir.

ARTIE VAUGHAN sworn for libelants:

Q. You were the telegraph operator at Velasco October of last year?

A. Yes, sir.

Q. Your testimony has been taken by deposition?
A. Yes, sir.
Q. You have annexed copies of telegrams to your deposition, and among them is one to Captain B. Burgess from Chas. Clark, dated the 12th, the time indicated to have been received is 8 a. m., reading, "Contract price agreed upon, will get things ready to start"?
A. Yes, sir.
Q. (Showing witness telegram to refresh his memory.) I will ask you, after examining the telegrams and the testimony that you have heard, to please state what, according to your best recollection and belief, is about the time that telegram I have read to you did reach your office.

Objected to on the ground that Mr. Vaughan has been examined in this case by deposition, and has already stated his best information and belief on that subject in answer to the 6th interrogatory. Objection overruled.

A. It may be a mistake in the letter- "A" and "P." From the facts it does not look like they could send that telegram before the cable was received.
Q. What is your best judgment?
A. I could not say positively.
Q. You are not positive it was received at 8 a. m.?
A. Nor am I positive that it should be 8 p. m.
155 Q. From the facts I understand you to say with regard to these despatches that it is not likely it was received at 8 a. m.?
A. I do not know. My records show the time of receipt and delivery.
Q. How do cables come from Europe to Velasco? Do they pass through Galveston?
A. I do not think they do. They come through New York and direct to Houston.
Q. And from Houston to Velasco?
A. Yes, sir; they do not pass through Galveston *en route.*

Cross-examination:

Q. Did you not tell Judge Lockhart that you had no independent recollection?
A. Nor have I.
Q. Didn't you tell him, when you testified before, that you had your record slip before you?
A. Yes, sir.
Q. Was that a fact?
A. Yes, sir; and I have lost it since.
Q. You have been subpœnaed by Judge Lockhart to produce that?
A. Yes, sir; but could not do so, because I lost it.
Q. You testified then with your record before you?
A. Yes, sir.

Q. As I understand it now, that you do not understand how Capt. Clark could know in Galveston, at 8 o'clock in the morning, of the cable which you received at 1 o'clock in the afternoon—that is the only reason?

A. Yes, sir.

Q. You mean to tell the truth?

A. Yes, sir.

Q. You have lost that record?

A. Yes, sir.

Q. Would the records at Galveston show when that dispatch from Mr. Clark was sent?

A. Yes, sir.

Redirect:

Q. You do not know of your own knowledge?

A. No, sir.

Recross:

Q. Speaking of the probabilities that they keep a record the same as you do?

A. Yes, sir.

156 ROBERT ROSS sworn for libelants:

Q. What business do you follow?

A. Stevedore and general contractor.

Q. You are of the firm of Ross & Merrow?

A. No, sir.

Q. Were you at Velasco on the occasion of this steamer being stranded and taken off?

A. Yes, sir.

Q. Did you see her when she first went ashore?

A. Yes, sir; I came over Velasco bar probably a half an hour ahead of her with towboat and two barges.

Q. Did you go where she lay?

A. Yes, sir; Friday.

Q. How did you happen to go down there?

A. I was lightering the *Whitejacket* outside of the bar.

Q. You were employed by Captain Brock?

A. Yes, sir; I was foreman.

Q. What position did you observe her to be in?

A. At first she was on the top of the jetty—angling, not parallel.

Q. Did you assist them to take her off?

A. No, sir; but I laid the first anchor for her on Saturday; or rather, I assisted Captain Brock to lay the anchor.

Q. Have you had experience in handling vessels going to sea?

A. Yes, sir; I served my time at sea.

Q. Have been a stevedore for a number of years?

A. Yes, sir.

Q. You will please state whether or not she was in a position of peril, and if so from what?

A. She was in a dangerous position. Any ship on the beach is.

Q. To what danger is she exposed?

A. In time she is likely to start to leaking, by thumping and starting her rivets.

Q. Then what?

A. The ship would stand up.

Q. What would be the result?

A. Total loss; generally does when ships get sanded.

Q. Do you know how many men were employed in taking her off?

A. I do not know.

Q. Did you ever talk with Captain Burgess while she was on shore?

A. Yes, sir; I remember Captain Burgess contracting to get her off. He told me he preferred Captain Brock to do the work to Captain Clark, but that Brock's bid was too high. I tried to get him to give the work to Captain Brock, of course, as he was my employer.

157 Q. Did Captain Burgess tell you what the bid was?

A. No, sir; except that it was too high.

Q. Did he ask you what was a reasonable bid to take her off?

A. No, sir; but he asked me what I thought about taking her off, and I told him the only way was to get some barges and lay anchors. He could not do that himself, because he had no appliances to do it with.

Q. Did he ask you what salboys there were in Galveston or elsewhere?

A. No, sir; because at the time we were talking about it Mr. Clark was there, and he knew of Captains Clark and Brock both at that time; he did not ask me whether any others were here or not.

Cross-examination:

Q. Had Brock no anchors suitable for the purpose in Velasco?

A. No, sir.

Q. Had he anywhere?

A. No, sir.

Q. Did anybody else have any except Clark?

A. Not to my knowledge.

Q. How did you expect Brock to do the work without the anchors?

A. I presumed he could have made some arrangement with Captain Clark, or he could have bought anchors, or he could have gotten along with smaller anchors by employing a larger number.

Q. Did Captain Clark have any other lighters there?

A. Yes, sir; I think he had one from Captain Brock and one from the syndicate.

Q. Were you one of the crew that planted the anchor after Captain Clark came down?

A. No, sir.

Q. Was Mr. Brock with his own lighter there or with the other lighter or on the ship?

A. I do not know where he was; I was not on the ship.

Q. You have spoken about what might have happened to the ship. Have you known of your own knowledge that happening to any steamer along this coast?

A. I worked on one right here, the *Alabama*, that broke her back.

Q. How long ago was that?

A. In 1874 or 1875.

Q. Was she got off?

A. Yes, sir.

Q. How long did it take?

A. The first contractor worked on her two months, and then I worked under Brock upon her about three weeks.

158 Q. Got her off?

A. No, sir; he failed. The next tide filled her deck with water, and when she was finally gotten off her back was broken, and I could put my hand through the plates.

Q. How long did it take to get her off?

A. I do not know how long the first contractor tried; I worked on her three times.

Q. What kind of weather did you have?

A. It was southeast blow.

Q. What season of the year?

A. In September or October. I am not certain about the time.

Q. Is that the only experience you have had with iron steamers?

A. Yes, sir; that is the only iron steamer I have had anything to do with. I worked on the ship *William*.

Q. Were you subpœnaed in this case?

A. No, sir.

Q. Where do you live?

A. In Galveston.

Capt. J. ANDERSON sworn for libelants:

Q. Did you go down on a salvage expedition to Velasco?

A. Yes, sir.

Q. What did you take with you?

A. Ropes, blocks and provisions.

Q. What vessel did you go down there on?

A. *Louis Dolson*.

Q. Who hired your schooner?

A. Capt. Clark.

Q. What did you take down?

A. Blocks, tackle, ropes and provisions, and men also.

Q. Do you know for what length of time you took supplies?

A. About five weeks' supplies.

Q. And how many men?

A. About 20 or 30 men. We had a whole sack of coffee, and plenty of everything. Fully two months' supplies for 20 or 30 men.

Q. Do you know of his having taken another vessel down there?
A. Yes, sir; a schooner brought the anchors down there.
Q. And what other tugs?
A. Schooner *Dixie*.
Q. Did he not take two tugs down?
A. Yes, sir.
Q. Did you assist in taking off the vessel?
A. No, sir.
Q. You simply went down with these schooners?
A. Yes, sir.
159 Q. Are you familiar with the coast there?
A. Yes, sir.
Q. What winds may be expected in the month of October?
A. East, southeast and south, but the heavy winds we have here are easterly and southeast.
Q. Did you see the vessel where she lay there?
A. Yes, sir.
Q. Was she *un*exposed to any danger from easterly or southeast winds?
A. Yes, sir; the jetties were not any protection for her at all. When the sea breaks in at all it comes right straight in there.
Q. They struck the jetties on the end?
A. Yes, sir; and make the sea roll heavier.

Cross-examination:

Q. What is the size of your schooner?
A. Fifteen tons.
Q. How long?
A. Forty-five foot keel.
Q. How deep?
A. About four feet.
Q. How wide?
A. About 17 feet wide.
Q. How long was it hired for?
A. I was hired to take these things down; no length of time. I was only hired to take these things down and stay there till the vessel got off.
Q. What were you paid for it?
A. I received $100.
Q. I am asking about the agreement when you started; what agreement did you have with Captain Clark?
A. I was going to take the load down for $35.
Q. And come right back?
A. Yes, sir.
Q. And you got $100?
A. I was paid for waiting during the time he was waiting on the ship.
Q. How did you happen to know the number of days' provisions aboard?
A. I approximate it. We had barrels of stuff.

Q. Nobody asked your opinion till you testified—how long the provisions would run?

A. No, sir.

Q. Didn't Mr. Stubbs ask you how much provisions you had before you went on the stand?

A. No, sir.

Q. Did Captain Clark?

A. No, sir.

Q. Who suggested to you the answer of 21 days?

A. We had dray-loads of provisions.

Q. You just inferred the number of days?

A. Yes, sir.

160 Q. What time did this other schooner get there with the other anchor?

A. Two or three days after.

Q. Was the ship floated then?

A. No, sir; the other schooner was not used.

Q. She got there the day they floated the ship?

A. No, sir; the day before.

Judge F. W. FICKETT, for libelants:

Q. You are a practicing lawyer at this bar?

A. Yes, sir.

Q. Were you the United States weather observer before that time?

A. Yes, sir.

Q. How long did you occupy that position?

A. About eleven years.

Q. How long at Galveston?

A. About five years.

Q. What years were those?

A. From about '86 and about five years thereafter.

Q. I want to inquire of you what the prevailing winds are during the month of October and their average velocity, and general information about that time during the time you were (interrupted)——

Objected to on the ground that the evidence is incompetent, not being of record.

The WITNESS: I have the record in my hand. I have a table here compiled for twenty years. It is a printed copy of the official records of this office, and I have verified it with the original in the office.

Mr. KIRLIN (examining the document): I object to it, as the record itself would be the best evidence, and it does not appear to be an official record; it is merely a table made by Mr. Cline.

Q. Who is Mr. Cline?

A. He is the present official here.

Q. Made up from the official records?

A. Yes, sir.

Objected to. Objection overruled.

Q. I will ask you with regard to the winds, their prevailing direction, velocity, &c.?

Objected to as the record would be the best evidence. Mr. Kirlin agreed to allow the sheet to be put in evidence.

161 Counsel for libelants offered in evidence the deposition of J. C. SMITH; also the first deposition of the master.

Mr. Kirlin offered in evidence the deposition of THOS. BELL, one of the owners of the steamship.

To the 4th interrogatory and its answer libelant's counsel objected, because it appears therefrom that the witness is testifying from hearsay, and no sufficient predicate is laid by him for the expression of his estimate of the value of the *Elfrida* when she was salved and taken into Velasco, nor after she had been repaired.

Objection overruled. Exceptions taken.

To the 8th interrogatory and its answer, counsel objects because it is immaterial to the issues herein, whether witness knew of an offer made by libelants to get the *Elfrida* off the beach for such sum as the courts would allow him, and what he would have done if he had known this is entirely irrelevant and foreign, self-serving and inadmissible.

Objection overruled. Exceptions taken.

To the 9th interrogatory and all of its answer which states that if the witness had been aware of the matters inquired of he would not have authorized acceptance of the tender, because of the same objections urged in the last exception, and because it is not competent for a witness to undertake to say at this time what he would have done under certain conditions at a former time, and his hypothetical action is not evidence, or in any way relevant.

Objection overruled. Exceptions taken.

The same objections as urged in the two preceding paragraphs are renewed to the 10th interrogatory and its answer. It is immaterial whether the witness's authority was given on the assumption that the matter stated in those cables were correct or not, or what his suppositions were, as he is bound by the act of his agent
162 acting within the real or apparent scope of his authority, and the master was such.

Objection overruled. Exceptions taken.

Without repeating the objections urged in the three last paragraphs, they are renewed to the 11th and 12th interrogatories and their answers, and they also except to those parts of the answer to the 12th interrogatory, setting out the discussions, consultations and conversations which the witness had with people in England, and their opinions and suspicions, as well as his, and they also except to any testimony as to the impressions produced upon the witness by letters or cables from his master, and they except to all mere conjectures, opinions and hearsay evidence set out in this witness's answers as being incompetent, irrelevant, immaterial and inadmissible.

The COURT: All that part in which he discussed the matter with

parties in England, and about what they thought, is clearly inadmissible. To that extent the objection will be sustained, but other than that it will be overruled.

Counsel objected to the 13th interrogatory because it was too general to permit of a cross-examination and is improper to be put, and the answer simply repeats what the witness had heard from his counsel, which of itself was mere hearsay and not admissible, and also his impressions and judgment and what he would have done under certain conditions.

The COURT: Everything he states so far as what his attorney may have told him is not admissible and as to what he would have done under certain circumstances is admissible, but I think the objection would be more to the weight of the evidence than to its admissibility.

Counsel for libelants excepts to the ruling.

Libelants' counsel also objected to the 4th, 5th, 6th and 8th cross-interrogatories because they were based upon the information
163 received from others and not upon the personal knowledge of the witness, and because any cables or transactions between the witness and the master of his vessel are not binding upon the libelants, they not shown to be present or participating therein, and evidence as to the witness's supposition is likewise incompetent.

Objection sustained.

Mr. JENS MOLLER, for libelants, sworn.

Q. You are a ship broker of Galveston?

A. Yes, sir.

Q. Have been engaged how many years in that business?

A. Twenty-two years.

Q. Your firm, J. Moller & Co., were charterers of S. S. *Elfrida*, October of last year?

A. Yes, sir.

Q. Mr. Morrissey was your agent at Velasco?

A. Yes, sir.

Q. What was the first advice you had of her being stranded?

A. I got a telegram from Mr. Morrissey to that effect, I think, on the 6th or 7th of October. I have it here.

Q. Did you or your partner go there?

A. My partner went there on the same day, but not on *Elfrida* business.

Q. Your only partner was Mr. Langbehn?

A. Yes, sir. He went there regarding business of another vessel at Velasco; if I remember right, the *Whitejacket*.

Q. Did you send Capt. Chas. Clark down there when you received this advice or shortly thereafter?

A. Yes, sir; I saw him about his wrecking facilities. I got a telegram from captain of the ship on the 7th of October, Capt. Burgess, saying that *Elfrida* had drifted across the jetty and now beached, and to advise Lloyd's agent to wire when assistance would be sent. Morrissey in another telegram here telegraphed for assist-

ance. Immediately on receipt of these telegrams from Morrissey and the captain I went to see Mr. Adoue, the manager of the Galveston Steamship and Lighter Co. here, which concern occasionally also assisted vessels off the beach when in distress, and as a concern in which I am a stockholder I asked him if he would send
164 tugs and appliances to Velasco to assist this ship off, the *Elfrida*. He considered it for some time and finally said "No."

Mr. Kirlin objected to what "he said." Sustained.

He refused to go; then the only other appliances I knew of in this town was Charlie Clark & Co., who at various times have been engaged in the same business. In fact, I have personally taken three or four vessels off the beach with the assistance of Chas. Clark & Co. I went to him and asked him if he would go there. If I remember rightly, I think I said to him to see what could be done, to go down there and see what could be done, and he said he would, and I understand he went there that day or the next day.

Q. About the 7th?

A. About the 7th or 8th. Charlie Clark reported to me in a day or two after; I am not positive whether the 9th or 10th, but in a day or two afterwards, when he came back from Velasco, he said he could not make any arrangement. He said the captain was not prepared to make any contract for to heave the *Elfrida* off, and from that time on all his correspondence went on between the captain and his owners. The captain sent me only one telegram till the ship was off. He did not negotiate with me direct in any manner, except through Morrissey, except that one telegram which I have read. Everything else was done between the captain himself and the owners, as far as I know.

Q. Did you communicate with the owners?

A. On the 7th I sent a cablegram to Newcastle advising them what had occurred.

Q. Have you that cablegram?

A. No, sir; I have not the cablegram with me.

Q. "She is beached; she is not out of danger yet. Assistance has been sent. She still continues tight." That was sent on October 7th, and it appears to have been received on the 8th?

A. That is the one I wrote. On the 9th I wrote them a letter confirming the cablegram, and explaining the position as far as I could from the information I had before me, and I embodied part of the telegram from Morrissey in my letter of the 9th.

165 Q. This is all the correspondence you had?

A. As regards the stranding I had no other with the owners.

Q. Any with regard to Lloyd's agent?

A. Had no information or request from the owners till later on when it became a question of taking the vessel.

Q. Did you not receive a request from Burgess to send Lloyd's agent?

A. Yes, sir.

Q. What did you do in pursuance to it?

A. I went to Sorley's house and he was not very well. He had

been feeble for some time. He did not move about very well. I told him of the importance of the case; that Velasco being an isolated spot, only a few vessels there, and that if he could risk his health to strain a point to go if he could. He promised to go the next day if he felt well enough. I saw him at the train one of the following days when he said he was going there, but whether he did or not I am not able to say of my own knowledge.

Q. Did he make any report to you on his return?

A. Only in a general conversation. He made no official report to me, except that he had consulted with the captain. He did not say anything in particular to me.

Q. How long has Mr. Sorley been representing Lloyd's here?

A. I am not positive on that point, but I have known him for 25 years, and as far as I know he has been Lloyd's agent all that time.

Q. He acted as marine adjuster?

A. Yes, sir; he was the only one here.

Q. He had considerable maritime knowledge and experience?

A. From the maritime records I have only seen one of his adjustments disputed in law, and that was decided in his favor. He was an expert in those matters, a great expert.

Q. It appears you wired your agent, "Terrible hurricane reported off Point Eads; protect *Elfrida* quickly;" where did you get that information?

A. There was rumors on the street, as is the custom when any changes are expected, and knowing the precarious condition of the vessel, I went up to Dr. Cline's office, the weather bureau, and I asked him if such was a fact, and he confirmed it, that there were indications of that kind approaching.

166 Q. Did any storm follow?

A. Not that I remember. If there was I did not see it.

Q. How far is Port Eads off this place?

A. About two days' sailing by steamer. I do not know the real distance between Galveston and Port Eads. Eight times 36 would give the distance; about 250 miles.

Q. You say the weather bureau confirmed the rumor?

A. Yes, sir.

Q. Here is another message from Morrissey: "Will stand by wires all day," sent on the 7th, and your reply seems to be: "Is ship making water? Will send assistance as soon as possible."

A. It was on that and the captain's telegram that I got it.

Q. I see on the 7th you wired Morrissey: "Recommend Chas. Clark attend solely to the matter, being very practical man"?

A. Yes, I sent that telegram.

Q. Why did you recommend him solely?

A. For the reason that Mr. Brock was already in Velasco and in my employ to lighter the steamship *Whitejacket* and other vessels there, and if he undertook to assist the vessel off the beach, having only one tug, my business might be neglected and my vessels were worth $200 per day to me, and I did not want to jeopardize my own interests if I could help it.

Q. You subsequently received a telegram from Brock making

some complaint. Mr. Beers and Mr. Sorley also seems to have received the same message in effect?

A. Yes, sir; I received one from him dated the 8th.

Q. What was the nature of it?

A. Complaining why I did not give him a chance, which I suppose was caused by Morrissey telling him about Clark doing the work, otherwise I do not know why he sent it.

Q. What was your reply?

A. In substance, if he attended to my business he could do as much other business as he wanted to, but my business first. I have the original here if you want me to read it.

Q. Yes; please read it.

A. "Telegraphed Morrissey on the eighth to inform Brock privately, as the master of *Elfrida* called for assistance we could not help, but send Charley Clark who had only tugboat available, inasmuch as Mr. Adoue who had the other one had refused to 167 go." I added to it, "We have no objection to Brock assisting *Elfrida*, making his own bargain, so long as he attends to *Whitejacket*. *Lizzie* arrived here. Will be with you tomorrow." That was another one of my chartered steamers going to Velasco.

Q. Do you know of any proposed arrangements between Clark and the vessel or Brock and the vessel?

A. Only by hearsay. Only what they told me afterwards. Of my own knowledge I know nothing.

Q. Who is W. F. Beers & Co.?

A. He is an insurance agent, and represents the underwriters' association in New York as local agent.

Q. There has been a telegram read also from Mr. Morrissey to you, stating that Clark's bid had been accepted. That telegram is dated the 12th. "Pyman accepts Clark's bid; tell him get here quickly."

A. Yes, sir; that was received by me on the 12th.

Q. Do you know the time you received that?

A. It was received at the Galveston office at 2.35 p. m. It generally takes ten minutes to transmit it from their office to my office.

Q. What did you do then?

A. When I saw Mr. Clark and told him in substance what this telegram said.

Q. What did he say?

A. Said he would attend to the matter as soon as he could, but it would take him some time to get ready.

Q. Did he say anything about having heard already?

A. No, sir; he communicated nothing to me.

This question and answer was objected to, but overruled.

Q. Do you know what action he took about wiring Captain Burgess?

A I do not know, speaking from my own knowledge.

Q. We have here a telegram dated the 14th, addressed to you from B. Burgess: "If Clark cannot come here today, agree with some other tug, same price."

A. It is dated Galveston the 13th, 9.05 a. m.

Q. What does it say?

A. "If Clark cannot come here today, agree with some other tug same price; too much time already lost."

168 Q. What action did you take?

A. I went to hurry Clark all I could. I told him in pretty sharp language that I agreed with the captain that a great deal of time had been lost, and Clark made some kind of excuse that it was impossible to get appliances and everything all at once; that he had to get very heavy anchors, barges, &c. However, I hurried him all I could.

Q. What reply did you send to Captain Burgess?

A. On the 13th I telegraphed Burgess at Velasco: "Unfortunately, no other tugs here to be had. Clark making all possible progress to get his tugs, hawsers and anchors ready. Expect him ready soon. Will wire again."

Q. You did wire later?

A. On the 13th I telegraphed Burgess: "Clark, with tug and appliances, proceed this afternoon."

Q. Did you have anything to do with preparing the contract for Captain Clark to take with him?

A. No, sir.

Q. On the 23d there was a telegram which seems to have been sent on the 23d from Galveston by Moller to Morrissey, at Velasco, reading: "Do not let *Elfrida* sail till we advise." What were the facts that caused that telegram to be sent?

A. That telegram was sent by my partner. I can only say, in a general way, that Clark had come back from Velasco and conveyed to us, as agents of the vessel, that there was some trouble between he and the captain about the salvage money, and asked us not to let the vessel sail till he had made arrangements or he had seized her, and I told him there was no necessity of acting hastily, and that I hoped they would come to some amicable arrangement, and that I would see that she did not sail for a day or two, as far as I could prevent her, until you can arrange matters further, and this is undoubtedly the cause why my partner sent the telegram.

Q. On the 24th a telegram was sent to you by Clark: "Have Wilson get papers ready seize *Elfrida*.. I will be in Galveston tonight." That was a dispatch from Clark to you?

A. Yes, sir; that signified that he could not make any arrangements with the captain at Velasco and asked me to procure the necessary legal assistance to detain the vessel as I did not

169 promise to detain her any further, and I asked Mr. Wilson to get the papers ready for Mr. Clark, and I suppose he did.

Q. Mr. Wilson is Captain Clark's attorney?

A. Mr. Clark was in the city a few days before this and when he came to me I suppose he had already seen Mr. Wilson on the subject.

Q. Counsel here referred to a telegram dated the 24th, recommending Brock's tug?

A. That was after the ship was arrested. Mr. Brock had a small

tugboat which used to run from place to place on the coast, and there is only one train a day from Velasco, and after that has gone at 2 o'clock in the afternoon there is no other train till next day, whereas tug could get here in six or seven hours, and therefore in order to save time I recommended his coming on Brock's tug so he would be here 12 hours sooner than if he came by train next day.

Q. Did you get a reply from that?

A. Morrissey telegraphed on the 24th: "Do not like let tug go till finished. Will send captain on tomorrow's train." Brock was at the same time lightering *Lizzie* there, and I suppose he did not care about hiring her out for other purposes.

Q. What was the occasion of your wiring Morrissey on the 24th: "Two telegrams here for *Elfrida*. Shall I open and wire contents?"

A. Those telegrams were sent to Galveston office, and the telegraph office here, when there is any telegrams here for ships, come to the various ship brokers to find out if they know anything about it, and the boy leaves it at the ship broker's office who says yes. Being the only telegrams sent in our care while this matter was pending, I did not feel I had a right to open and I asked if I should do so and reconvey the contents to Velasco. I think Mr. Morrissey replied the next day to repeat *Elfrida* cable here. I did not do so because before I got that telegram Clark was on his way to Velasco, and he took them with him.

Q. You wired him on the 25th, that Clark's tug had proceeded, and U. S. marshal will be on board this afternoon?

A. Yes, sir.

170 Q. Here is a telegram dated the 25th, from Moller to Morrissey, "Clark's tug; marshal*l* has Burgess telegrams"?

A. Because he was going, but did not go. I could not help that he gave up going there. The captain came next day, or shortly afterwards, to settle up his business.

Q. How do cables from Europe come to Velasco?

A. Via Houston.

Q. Don't touch here?

A. No, sir.

Q. Is Velasco in communication with all parts of the United States and Europe?

A. Yes, sir.

Q. Have you been there yourself?

A. Yes, sir.

Q. Do you know the situation where this vessel was beached?

A. Yes, sir; I have been all over the beach.

Q. You had no personal knowledge of the ship?

A. No, sir; I did not see her till she got to Galveston.

Q. Do you know of Capt. Clark's having had diver examine vessel?

A. Only by hearsay.

Q. You know Lloyd would give her a waiting, on the strength of the survey?

A. I do not know. The underwriters refused to take her, until her bottom was surveyed in dock.

Q. Do you know what she was insured for?
A. I do not.
Q. How much are they generally insured for relative to the value?
A. No one insures a vessel to her full value unless he wants to lose her; then he will make it as high as possible.
Q. A vessel insured for eighteen thousand pounds may be presumed to be worth twenty thousand?
A. That is a very hard question to answer. I am familiar with it in the abstract sense. A vessel insured for eighteen thousand pounds is supposed to be worth it.
Q. You know the repairs done on this vessel?
A. Only by hearsay. From the report that came from Norfolk her bottom had been pounded.
Q. You made no disbursements for it?
A. No, sir.
Q. Did you have any interest in Captain Clark's taking this vessel off?
A. No, sir; not five cents' worth.
171 Q. Your firm?
A. No, sir.
Q. You would have known it if your partner had?
A. Yes, sir. I have only one partner and he is the junior partner, and his interest is only to the extent that I permit.
Q. What are the functions of Lloyd and his agent in this place?
A. To assist vessels that get into distress by stranding or otherwise or anything that may effect the underwriters.
Q. Was Mr. Sorley a competent and trustworthy man for that position?
A. Lloyd would not have retained him twenty or thirty years if he had not been. He was feeble during the last part of his life, but he was a very brainy, clear-headed man.
Q. Had you held surveys with him before this?
A. No; I was in an arbitration with him a short time before. I was the umpire in an arbitration in which he served about two months before.

Cross-examination:

Q. Was it the sum of your evidence that there was no one else to do this work except Charles Clark?
A. At Galveston; yes, sir.
Q. At Velasco?
A. Outside of Clark and Brock I did not know of any tugboats that were able to pull a tree off the beach.
Q. Did anybody else have any plant to do it with?
A. Yes, sir; north of Galveston.
Q. Here?
A. I am not aware of any such plant existing.
Q. Bringing assistance from a distance would cost more time and money?
A. The Merit Wrecking Co. has been here several times to assist

vessels off the beach and it has taken them on an average of ten to twelve days to get here.

Q. You did not advise Morrissey the propriety of communicating with them?

A. I was not asked to make suggestions.

172 Q. You suggested that Clark do so?

A. As between he and Brock, because Brock was engaged attending to my business.

Q. Brock's name had been mentioned in your telegrams till you recommended that Clark attend to it exclusively?

A. I knew that Brock would try to make the contract if he could. I knew he had only one tugboat, and that he had to go over the bar twice daily and that he could not attend to my work if he engaged in wrecking.

Q. You knew Brock personally?

A. Yes.

Q. He addressed you and asked you "Why shut me out?"

A. He asked me why he could not attend to it, and I had no objection to it if he made his own arrangements and did not neglect my business.

Q. He asked you why you did not give him a chance?

A. He says in his telegram, "I have been on the ground and rendered assistance to *Elfrida* running anchors, &c. Why shut me out altogether? Am able to furnish plant." I did not know he had been doing anything.

Q. Why did you not address him directly?

A. All my communications went through my agent, Mr. Morrissey, except one telegram to the captain.

Q. Brock did not send his through your agent?

A. No; it seems not.

Q. What was the occasion of having Morrissey inform Brock privately?

A. For the reason that I did not want the people at Velasco with whom Brock was not on good terms to think he could not get work from me if he could not get it on his own hook. I had no objection to his getting the job if he attended to my work. The only reason I did not want him to do it was because of his obligations with me, and having only one tugboat he could not do both.

Q. You could have told that to Brock?

A. I was telegraphing to Morrissey several times a day.

Q. Was the statement in his telegram that he had ample plant correct?

A. I do not know, except that he had one tug and two barges.

Q. That was on the 8th these telegrams passed between

173 you and Brock and you and Morrissey, and the matter was not finally closed till about the 12th?

A. I believe so.

Q. Nothing further seems to have been heard from Brock?

A. Not as far as I was concerned. I suppose my telegram to Morrissey to tell him to make his own bargain was satisfactory.

Q. Do you know whether or not Brock made his own bargain?

A. I do not know, but I know he attended to my lighterage.

Q. In point of fact, Brock's lighter did assist?

A. I do not know whether he made any contract or not with anybody of my own knowledge.

Q. Captain Clark went down there Friday?

A. I do not know exactly what day, but about that time.

Q. You saw Mr. Sorley going down; did you see Mr. Clark at that time?

A. No, sir. I passed Mr. Sorley opposite to the depot, about twenty or thirty paces toward the south.

Q. Do you know whether or not he and Mr. Sorley went on the same train?

A. I have heard so, but I do not know.

Q. That was Clark's second trip, was it not?

A. He went down as soon as the ship stranded, and as soon as he got his appliances ready, about the 13th, I think. I understand he went with his tug, but do not know.

Q. You understand he went there on three occasions?

A. I understand he was there on the 8th and came back again, and I do not know whether or not he went again till the 13th.

Q. You said he went with Sorley?

A. I do not know what day Sorley went.

Q. Do you know whether there was some difficulty about coming to terms between the captain and Mr. Clark?

A. After the salvage?

Q. Before the agreement.

A. I only know by hearsay; I heard it.

Q. Didn't Capt. Clark tell you at the time that he could not agree on terms?

A. He told me he had tendered the bid and that there was
174 some other boat or boats there, but that his was the lowest and was the only accepted. I asked him how much and he said $20,000.

Q. Did you not say they could not come to terms?

A. That was on the 8th.

Q. You understand they could not get together?

A. He told me he had tendered chains, anchors, &c.

Q. Why didn't you suggest to the master to hire them?

A. I have found that — is best to keep hands off, unless you are asked.

Q. You were agent of the ship?

A. No; only the charterer.

Q. It was sent to you under the charter-party?

A. Simply for the cargo.

Q. They had no other agent in Galveston?

A. No other except under the charter-party to be loaded. Outside of that he was his own agent.

Q. You were the only agent he had here?

A. Yes, sir; if you call mine an agency.

Q. You have had experience here when vessels sent to you were on fire?

A. Yes, sir.

Q. Haven't you exercised the right of an agent?

A. He has no power except that delegated by the captain. I never acted unless the captain called on me. Whenever the captain tells me to, I act; in this case he never told me anything.

Q. Haven't you always acted?

A. Yes, when he authorized me to, not otherwise.

Q. Has there ever been an instance when you have not acted?

A. Yes, sir; when the captain had his own instructions.

Q. Never employed any other agent?

A. No, he acted for himself.

Q. You always got paid for it?

A. Well, I always try to get that whenever I can for my labor. In this instance, however, I got nothing.

Q. I understand you detained the vessel to allow Clark to seize her?

A. Morally, not legally.

Q. You telegraphed Morrissey not to release her?

A. He had no power over the ship.

175 Q. Hadn't the papers?

A. No, the custom-house had. I had no more power over that ship than you had.

Q. Did you get them?

A. I do not know that the ship was entered at all, because she was wrecked, and under the United States law when a ship is wrecked as a usual thing the ship agent keeps the papers.

Q. To oblige Clark you telegraphed Morrissey not to release the ship?

A. So Clarke should not give us unnecessary expense. He was in Galveston in person when I told him he could not seize her except through the court.

Q. You did not want the ship to go till he got her seized?

A. Yes; since I promised him.

Q. He has had salvage cases in the past?

A. Yes, sir.

Q. Has Mr. Wilson acted for him before?

A. I do not know.

Q. Is Mr. Wilson connected with you in any way?

A. Yes; he is my wife's father; both Mr. Stubbs and Mr. Wilson have cases for me in court.

Q. I understand you to say you cannot recall a case where Mr. Wilson has acted for Clarke in a salvage case?

A. I do not know of it.

Q. He telegraphed you on the 24th to have Mr. Wilson get the papers ready to seize the ship?

A. Yes, sir.

Q. Why did he telegraph you about it?

A. Because he had told me already he was going to do it, and I asked him not to do it till we had more time.

Q. Can you assign any reason why Clarke did not communicate directly with his counsel instead of through you?

A. No, sir. It would have been much quicker if he had done so, because I had to go and hunt Mr. Wilson up.

Q. Do you recollect how long Mr. Langbehn was down there?

A. I do not know. He was there to clear a ship. He had no connection with the *Elfrida*.

Q. He was there two days?

A. Yes, sir; he could not get back before. You leave here in the morning and get there at 2 o'clock in the afternoon.

Q. Only one train a day?

A. Yes, sir.

Q. Was it a commercial place of any size?

176 A. Not a great deal. Last year I suppose 20 or 25 steamers loaded there.

Q. Were you the only ship agent there at that time?

A. Yes, sir; the only ship agent that did business for steamers. Had enough to do with sailing vessels.

Q. How long have you been a ship broker?

A. For 25 years. I have been nineteen years in business for myself.

Q. There have been vessels sent to you before this one that have been beached?

A. Yes, sir; I have taken several off myself.

Q. All iron steamers sent to you have gotten off when wrecked?

A. Yes, sir.

Q. Mr. Clark got most of them off or helped to do so?

A. He helped in several instances, and with several sailing vessels that did not get off.

Q. Apart from this lighterage Co. in which you are interested, I understand you to say that Mr. Clark has the only heaving anchors fit for this work?

A. The only anchors fit for a job of that kind.

Q. Anybody else got any?

A. I am not prepared to say. I think there are some smaller anchors here, but I think he has probably the only heaving anchors in this port.

Q. When captain applied for assistance, did you go to anybody else?

A. There is nobody else here but the Galveston Lighterage Co.

Q. And it was Clark or nothing?

A. Yes, sir; unless we had waited for wreckers from the Northern States.

Q. Do you know who drew up this contract?

A. Only by hearsay; I heard that Mr. Morrissey assisted to draw it up.

Q. Did you hear Morrissey say it came to him already drawn up, and he only altered one part?

A. I did not. He did not tell me how he drew it up.

Q. Have you ever seen Mr. Sorley's instructions from the Lloyd's in London covering his authority in this port?

A. I do not know anything about Mr. Sorley's instructions.

177 Q. Did you not testify that you did not know what the limit of his authority was?

A. I did not.

Q. Do you know whom he represents?

A. He represents Lloyd's in London.

Q. How do you know?

A. Because I have seen the correspondence.

Q. Is it not Lloyd's bureau?

A. It is Lloyd's federation of underwriters in London.

Q. You mean classification bureau?

A. No. I mean the Underwriters' Association of Lloyd's. It is an association of underwriters in London called Lloyd's.

Q. Don't you know that Lloyd's is nothing but a *a* name of the place where they go and subscribe policies?

A. Yes, sir.

Q. There is no association about it?

A. It is not incorporated as a matter of fact. It is not an association for the purpose of transacting business in one building. Each underwriter writes for himself, and does not bind his co-writers. It is the biggest insurance institution in the world.

Q. Was the master in Galveston before the 12th?

A. I do not know. He was not to my knowledge till he came to clear his ship. There was an instance when Mr. Wilson represented Mr. Clark in a salvage case, the steamer *Rider*, for which I was also agent. It has just come to my mind, and I mention it because it seems that great stress has been laid upon that fact. Adoue & Lobit were general agents, and I was subagent.

Redirect examination:

Q. Have you known of iron steamers being lost or damaged by going ashore?

A. The steamer *Australia* went ashore in 1875 in a hurricane, and she went upon the beach high and dry. She was in about 8 feet of water, when she drew 24 when afloat. It took the Meritt Wrecking Company three weeks to get here from the date of
178 their contract, for which they got paid $60,000. It took them 9 weeks to get her off, as heavy weather came on several times when they got her nearly off and she went in again. As vessel must be either afloat or aground, she must be one place or the other; when she is half way afloat and a heavy gale comes, it thumps her to pieces in a short time. Once there is a hole in an iron vessel it is good-by-. She was gotten off and taken north for repairs. I was clerk for Walthew & Co., her agent at that time. I had the steamer *Hesper* on this beach loaded with salt and sustained such leakage that the underwriters would not take her. Several ships have been grounded on Galveston bar and sustained considerable damage.

Q. How about the *Frisco?*

A. That was a total wreck. She was embedded in water to her first deck. After they got her off some divers patched up her holes

to some extent, and after a tedious job they floated her and repaired her in such a manner that the underwriters permitted her to load till she got to Liverpool, when her bottom was overhauled and new plates put in her.

Recross-examination:

Q. Very heavy storm when the *Australia* went ashore?
A. Yes, sir; one of the heaviest we have ever had.

Re-redirect examination:

Q. How is the month of October with respect to winds?
A. September and October are treacherous months. Sometimes there are no storms and sometime- there may be a very treacherous wind. No certain rules can be laid down, but the end of September is bad weather.

Libelant's counsel offered in evidence the deposition of BENJAMINE BURGESS, which was objected to as immaterial. Overruled.

179 Mr. JAS. BAND sworn for claimants:

Q. What is your age and occupation?
—. My age is 42, my occupation is chief engineer on board the *Ludgate*, of London.
Q. How long have you been chief engineer?
A. Fifteen years.
Q. What experience have you had?
A. Eighteen years at sea; twenty-five years at the business altogether.
Q. Will you describe to the court what a steam winch is, and where it is located, and how many there are?
A. In ordinary cases there is one at each hatch, and in some cases there is two on the bigger class of ships.
Q. Do you know the *Elfrida?*
A. I have seen her once or twice in different harbors.
Q. How many winches did she have?
A. I could not say exactly, because I had no interest; merely seen her as another ship in harbor, but according to her build, I should think she had four holes, and in that case she would have four winches and windlass.
Q. Will you describe the construction of the steam winch; what is it?
A. It is a hoisting engine for taking cargo in and out.
Q. And there are four of them?
A. Yes, sir; on that class of ships there is one at each hole.
Q. Is it fixed on deck?
A. Yes, sir.
Q. Is there any connection between that and the engine's boiler?
A. None.
Q. Is a steamship fit for use, in every way, without any winches at all?
A. Yes, sir.

Q. From what source is the steam to the winches supplied?

A. In ordinary cases there is a winch boiler—what we call a donkey boiler.

Q. From what source is steam supplied to the main engine, or that which drives the engine?

A. From the main boiler.

Q. On board a ship in port, when you receive, as engineer, an order to get up steam, what do you get up steam for?

A. For the main engine.

Q. Is it part of an engineer's duty to get up steam on the donkey boiler to run the winches, without an order for steam for the winches?

180 A We have to put it in the log book what the steam is for, and where it is to be applied.

Q. Are winches built in England by the same firms who build engines?

A. No, sir.

Q. They are furnished by different builders?

A. Yes, sir.

Q. Describe the steam windlass of a ship, and where it is situated.

A. It is placed in the stem of the ship and sometimes it has an engine of itself, and other times it is only a windlass, when we generally call it the forward winch.

Q. Do you know which the case was on the *Elfrida?*

A. I do not.

Q. The steam windlass, as I understand it, works perpendicular?

A. That is the capstan; the windlass is a horizontal shaft.

Q. And winches have horizontal shafts, also?

A. Yes, and some vertical. The older style was diagonal and the new style is horizontal.

Q. In fact, besides the main engine which drives the ship on vessels of this class, to the best of your recollection on the *Elfrida* there were four or five smaller engines?

A. Yes, sir.

Cross-examination:

Q. A winch is a hoisting or winding engine?

A. Yes, sir.

Q. And a steam capstan is sometimes also an engine?

A. Yes, sir; or it can be driven from another engine.

Q. If it is operated by steam, the propelling power is furnished by an engine?

A. Yes, sir.

Q. And are not winches sometimes driven by steam from the main boiler as well as by the donkey boiler?

A. It is possible.

Q. When they want engine power and they have all the winches running at the same time, don't they supply the steam from the main boiler?

A. Yes, when it is wanted in emergency.

Redirect examination:

Q. Suppose a ship is on the beach and the contract is made with the salvage company by which he agrees to furnish material
181 and appliances to get her off; suppose that he is to have the use of the steamer's engine, as an engine, would you understand that to include the use of the winches?

Objected to as a matter of opinion. Objection overruled.

A. No, sir.

Claimants' counsel offered in evidence the weather report furnished by the Secretary of Agriculture under his seal, showing the direction and force of the winds, as taken from the Galveston office from the 4th of October up to and including the 25th of October.

Captain CLARK, libelant, recalled.

Q. How could you have used the engine except by using the winches and capstan?

A. We used the engine where we used all the winches and the propeller.

Q. What use could you have made of the engine?

A. I could have only made use of it by using the winches and the propeller.

Q. You have had a great deal of experience with the use of winches?

A. Yes, sir.

Q. What do you understand by the use of an engine in taking the vessel off?

Objected to on the ground that no predicate had been laid for that question. Objection sustained.

A. When I went aboard the ship I was to have the use of every engine, donkey engine and the main engine.

Mr. Kirlin moved to strike out the answer, as witness could not vary the contract by parol. Sustained.

Q. Did the captain place you in charge?

A. Yes, sir.

Q. Is it necessary to use the engines in using the winch?

A. No; there is a regular donkey engine, and you can either supply the steam from the donkey engine or the main engine. When they discharge the cargo they use the donkey boiler,
182 and when they have heavy cargo to hoist they supply the steam from the main boiler. When we get steam from the main boiler we shut the donkey boiler off.

Q. The engine runs the winch?

A. Yes, sir; the steam runs the engine and the winch.

Q. Can you run an engine without steam?

A. No, sir.

Q. Was there any other method of getting her off except by using the winches?

A. No, sir.

Q. Was that understood by the master?

Objected to. Sustained.

Q. You say you took off all the ship's anchors?
A. She lost two before I went there.
Q. You took off the others?
A. I took off two to lighten her up. I had my own anchors, and the captain told me to take off his anchors to lighten the ship up. I had anchors laying there, and merely took those off to lighten the ship up.

Cross-examination:

Q. What do you understand by an engine?
A. They furnish steam from the boilers to the engines.
Q. You do not claim there is any connection between the main engine and the donkey engine?
A. Yes, sir; the steam is furnished from the main boiler to the engines.
Q. The main engine has nothing to do with the donkey engine?
A. No, sir.
Q. Either one can run without the other running?
A. The main boiler furnishes steam to run the ship and the engines too.
Q. Or both can run at the same time or either can run independently of the other?
A. Yes, sir.
Q. But there is no connection between the main boiler which furnishes steam to drive the ship and the donkey and the winch?
A. No more than that steam is furnished from the main boiler.
Q. If they take it from the donkey boiler there is not even that connection?
A. No, sir.
Q. Did you not telegraph to your son at Galveston asking him to bring up another anchor?
A. Yes, sir.
183 Q. Why didn't you use it?
A. Because — did not have to use it.
Q. What time did the ship come off?
A. About the 15th or 16th, on the night of the 16th. One anchor got there on the 16th, and another on the 17th or 18th, I will not be certain.
Q. On the 17th or 18th the ship was afloat?
A. Yes, sir, but it was there if I wanted to use it. I did not know I was going to float it in a few hours.
Q. Yet you wanted to use the ship's anchors?
A. No, sir.
Q. What did you use them for?
A. Because we took them off to lighten the ship up.
Q. You put them down in the water where they were liable to be lost?

A. I returned everything as I got it. If I lost the ship's anchor I would have had to pay for it.

Q. If you had plenty of anchors when you used the ship's anchors why was it necessary to telegraph your son to bring another anchor?

A. In case of emergency. Sometimes we parted cables and lost anchors.

Q. Why did Mr. Brook telegraph you—"Captain goes to Galveston tomorrow; get papers and seize ship"?

A. Because Mr. Brook was there and when I left I asked him to keep a lookout, and then I owed him for helping me on the ship. He certainly did not work for nothing.

Q. Why did you telegraph to Moller?

A. Because it was understood between Moller and I that the ship was not to go away till I was settled with. He agreed to hold her for me till I got my pay.

Q. Did you seize her?

A. No, nothing of the kind.

Q. You know he telegraphed to Morrissey not to let her go?

A. I supposed she owed Moller something as well as she did me.

Q. You heard him testify he did it to oblige you?

A. I do not know anything about it. It was Mr. Sorley and the captain that made the contract.

Q. How many times were you in Velasco?

A. Three times.

Q. Did you go on the train with Captain Sorley?

A. No, sir.

184 Q. You told Judge Lockhart that you did?

A. No, sir; I told him I did not go through the train to see who was on it and did not know whether he was on it or not.

Q. In point of fact, he was on the train?

A. I tell you I do not know.

Q. You found him there?

A. I found him in Velasco, not on the train.

Q. Both arrived there the same day?

A. Not that I know of.

Q. Both happened to be there on the afternoon of the 9th?

A. Yes, I was there on the 9th.

Q. Do you know what time he went down?

A. I do not know anything about Sorley. When I got to Velasco I found him there.

Mr. J. C. SMITH sworn for libelants:

Q. You have been examined in this case with copy of telegram attached to the deposition?

A. Yes, sir.

Q. Why did you not attach the original?

A. I accepted legal advice and found that a copy was all that I could surrender, and this copy is an exact copy. We do not keep the originals longer than six months. We send them to New York.

Q. Do you know this is an exact copy?

A. Yes, sir. It was filed at this office at 8 p. m. (it was a little before 8 p. m.), and it was sent from this office at 7.59. That was a minute before the filing time, but the difference is in the clocks. The clerk puts the filing time upon it; the operator puts the sending time on it. The clerk put 8 and the operator 7.59. The difference in the clocks may account for that. There is a double check upon it with regard to the time of filing and time of sending.

Cross-examination:

Q. Did you compare that personally with the original?
A. Yes, sir.
Q. Did you compare it with this subject in view, this 8.25 a. m. and 8.25 p. m.?
A. No, sir; I was required to go before a notary and make a deposition.
185 Q. Did you make the examination with a view to ascertaining whether it should be a. m. or p. m.?
A. It never came up before me till this moment. I copied it just as I found it.

Telegram from J. Moller & Co. to M. P. Morrissey.

Velasco Terminal Railway Company Telegraph.

Number.	Sent by—	Received by—	Time received.	Check.
14J	O	X	5.30 p. m.	24 paid & D. H

Dated Galveston, Tex., 6th.

To M. P. Morrissey, Velasco:

Use wires freely "*Elfrida.*" Do you need tugboat assistance? Survey must be held and diver examine vessel's bottom before accepting; notice readiness to load.

J. MOLLER & CO.

Table Showing the Important Elements of the Climate of Galveston for Each Month, Compiled from Twenty Years' Official Records.

By I. M. Cline, A. M., M. D., local forecast official, United States Weather Bureau.

	Temperature—degrees Fahrenheit.												Relative humidity, per cent.			Precipitation—inches.											Clouds and sunshine.				Wind.					
	Normal.	Highest monthly mean.	Lowest monthly mean.	Maximum (highest).	Minimum (lowest).	Years with maximum above 90.	Years with minimum below 32.	Greatest monthly range.	Least monthly range.	Average diurnal range (7 years).	Average days with change in 24 hours of 4 to 9	Average days with change in 24 hours of 10 or over.	Average days with departure of 8 or more from normal.	Average.	Years average above 80.	Years average below 70.	Normal.	Years above normal.	Years below normal.	Greatest monthly.	Least monthly.	Years with daily rainfall of 2.50 or over.	Average number of days .01 or more.	Greatest number of days .01 or more.	Least number of days .01 or more.	Years with rainfall of 1.00 or more in 1 hour.	Average number of clear days.	Average number of partly cloudy days.	Average number of cloudy days.	Average days with some sunshine.	Approximate hours daily possible sunshine.	Prevailing direction.	Average hourly velocity.	Highest hourly velocity.	Years with highest above 40 miles per hour.	Years with highest N. E. to S., inclusive.	Years with highest S. W. to N., inclusive.
January....	52.3	64.6	46.7	75	11	0	11	58	28	12.7	13	4	14	79	9	0	3.98	10	9	8.15	.66	4	12	20	5	1	10	10	11	26	10.4	N.	11.9	62	7	1	19
February...	57.7	63.7	52.6	75	28	0	4	47	22	11.0	12	4	10	83	6	0	2.98	6	11	8.29	.50	3	10	14	5	2	8	10	10	23	11.4	S.	11.3	59	7	2	18
March.....	62.5	68 2	59.0	85	30	0	1	46	26	10.6	10	3	6	79	8	0	3.17	6	10	6.54	.91	2	9	16	3	3	9	12	10	26	12.0	S. E.	11.0	61	7	2	18
April	69.8	72.5	65.5	85	43	0	0	37	21	9.5	7	2	3	78	6	1	3.37	6	12	8.36	.00	5	7	14	0	1	10	11	9	26	13.2	S. E.	11.0	72	5	3	17
May.....	76.0	78.1	73.7	91	54	3	0	35	22	10.1	7	1	1	75	0	1	4.30	9	11	10.27	.03	4	7	12	2	4	10	14	7	27	13.6	S.	10.0	60	8	9	11
June.....	81.9	84.8	79.0	97	64	14	0	28	18	9.4	4	1–60	0	74	2	1	4.96	9	10	11.89	.03	9	8	16	2	3	12	13	5	27	14.0	S.	9.0	54	6	11	9
July	84.6	86.2	82.0	97	67	20	0	26	14	9.8	4	1–120	0	74	1	1	2.98	7	13	9.30	.34	1	9	17	3	1	12	15	4	28	14 0	S.	8.0	42	1	13	7
August	82.8	85.1	81.2	98	70	18	0	27	14	10.0	5	1–5	1–20	74	1	1	5.51	10	8	14.46	1.09	8	10	17	7	6	13	13	5	28	13.0	S. E.	10.4	53	3	12	8
September.	78.7	83.5	77.5	94	56	8	0	35	16	9.9	6	1	2	74	1	2	7.07	5	13	26.01	2.33	8	10	17	3	2	12	12	6	28	12.0	S. E.	10.9	60	7	9	11
October	72.5	77.1	69.4	89	45	0	0	41	26	10.3	9	1	5	74	1	0	4.96	7	13	17.78	T	9	7	20	0	2	15	11	5	28	11.5	S. E.	10.0	60	3	3	17
November..	63.7	65.8	54.1	85	29	0	2	51	30	12.0	11	2	12	78	3	0	4.61	8	10	8.91	.05	4	9	15	2	2	12	10	8	26	11.0	N.	9.0	54	10	1	19
December..	58.0	66.4	50.2	76	18	0	8	54	28	11.0	13	5	13	82	12	0	4.59	6	13	10.28	.23	5	11	18	3	3	10	9	12	25	10.5	N.	10.2	54	4	1	19
Year.....	70.0	*86.2	†46.7	*98	†11	.....	.....	*58	†14	10.5	.....	.....	.....	77	.....	.....	52.48	.....	.....	.....	.....	.....	109	.....	.....	.....	133	140	92	318	.....	S. E.	.....	.....	.....	.....	.....

* Greatest in any month.

† Least in any month.

187 United States District Court, Eastern District of Texas.

CHARLES CLARKE and Others
against
THE STEAMSHIP "ELFRIDA;" PYMAN, BELL & Co., Claimants.

Interrogatories to be Addressed to Thomas Bell, a Witness to be Examined in Behalf of the Claimants Pursuant to the Annexed Commission.

First interrogatory. (*a.*) State your name, residence and occupation, and the names of the other members of the firm of Pyman, Bell & Company.

(*b.*) Are your firm owners of the steamship *Elfrida?*

In answer to the first interrogatory, the witness says:

(*a.*) Thomas Bell, of 5 Quayside, Newcastle-on-Tyne, merchant and ship-owner, senior partner of the firm of Pyman, Bell & Co., which firm is composed of myself and of the following: Alfred Bell, Isaac John Swan, and Alfred Ernest Bell.

(*b.*) I am managing owner of the steamship *Elfrida*, and I own personally eighteen sixty-fourths in the *Elfrida*, and my copartners in the firm of Pyman, Bell & Co. own other nine sixty-fourths, the remaining thirty-seven sixty-fourths being owned by various friends of the firm.

Second interrogatory. If in answer to the first interrogatory you state you are one of the managing owners of the steamship *Elfrida*, then give her age and the particulars of her dimensions and tonnage.

In answer to the second interrogatory he saith: The *Elfrida* was built for our account and delivered to us by the builders
188 in January, 1889. Her dimensions are: Length, 290 feet; breadth, 38 feet; depth, 20.1 feet; her tonnage is: gross, 2,257, and net, 1,454.

Third interrogatory. State your experience as a ship-owner, the number of vessels you have owned or been interested in, and your qualifications, if any, to express an opinion as to the market value of steam tonnage in October, 1894.

In answer to the third interrogatory he saith: I have been manager or part manager of more than twenty steamers during the past twenty-five years, and I am the largest owner of shares in the eleven steamers at present under the management of my said firm of Pyman, Bell & Co., and I am and have been for many years interested by ownership in about thirty steamers under the management of other firms. I am also now and have been for many years past a director of several steamship mutual insurance associations in this town, in West Hartlepool, in Whitby and London. I have also negotiated the purchase and sale of steamers for many years.

Fourth interrogatory. (*a.*) Please state the market value, according to your best judgment, of the steamship *Elfrida* after the was salved and taken into Velasco or Galveston the latter part of October, 1894.

(*b.*) Give a liberal estimate of her value at that time and place, together with your reasons for fixing the amount of her said value at the figure you state.

In answer to interrogatory fourth: (*a.*) After the *Elfrida* was salved and taken into Velasco, there was such an uncertainty as to the condition of the bottom that I doubt whether any person or persons of sufficient enterprise would have made a bid for her, especially taking into consideration that she would have to steam, or be towed, to Norfolk, or Newport News, a distance of about 1,700 miles, for the purpose of dry-docking, and that no underwriters would have taken the risk for such a distance, except at a very high premium. Taking these circumstances into consideration, I estimate her speculative value as £9,000, after being salved and taken into Velasco.

(*b.*) Even after she had been repaired, her selling price
189 was, I estimate, not more than between £13,000 and £14,000; I am putting a liberal estimate upon her value when I say £14,00-, on leaving Newport News in November last. My reasons for fixing this amount are twofold: (1) that in my intercourse with ship-owners I am kept fully conversant with the purchase and sale prices of second-hand steamers of various sizes, types and ages; (2) that a boat of her size, type and tonnage could have been bought *new* in October last for the sum of £20,000, and deducting from this amount 6 per cent. annual depreciation, I arrive at the *Elfrida's* value as £14,000 after being salved at the latter part of October, 1894. At the time of her stranding she was insured for the sum of £18,000, but we have since reduced the value to £16,000; these amounts are book values only, and have regard to the fact that she was bought at a time when steamship tonnage was fifteen per cent. dearer than during the past six months.

Fifth interrogatory. (*a.*) Please annex to your answers to these interrogatories all communications received by you from Captain Burgess, having any reference or relation to the stranding of the *Elfrida* near Velasco, and to the matters involved in this suit from the date of the stranding until the vessel left Galveston for Newport News to go into dry dock.

(*b.*) Have you done so?

(*c.*) On what dates respectively were the said cables received by you, and on what dates were the cables you sent Captain Burgess dispatched, and from where?

(*d.*) If any of the words in the said cables are in cipher, please state what code was used in the telegrams, and connect with each cable containing cipher words a true and correct translation thereof, according to the said code.

Answer to int. fifth. (*a.*) (*b.*) As desired, I annex the original cables received by me from Captain Burgess from the time of the stranding of the *Elfrida* on October 5th up to October 29th, when she left Velasco for Newport News. I received two other communications from Captain Burgess, namely, letters dated October 7th and October 15th, and I give reference to them in my answer to the seventh interrogatory.

(*c.*) The dates of the cables received by me from Captain
190 Burgess and referred to in the above (*a*) (*b*) are as follows:

Cable	dated	Oct.	7th,	marked	(1),	received	Oct.	8th,	about	9 a. m.	
Do.	do.	do.	8th,	do.	(2),	do.	do.	8th,	do.	5 p. m.	
Do.	do.	do.	10th,	do.	(3),	do.	do.	10th,	do.	9 a. m.	
Do.	do.	do.	11th,	do.	(4),	do.	do.	11th,	do.	4 p. m.	
Do.	do.	do.	12th,	do.	(5),	do.	do.	12th,	do.	9 a. m.	
Do.	do.	do.	16th,	do.	(6),	do.	do.	16th,	do.	9 a. m.	
Do.	do.	do.	18th,	do.	(7),	do.	do.	18th,	do.	4 p. m.	
Do.	do.	do.	18th,	do.	(8),	do.	do.	19th,	do.	9 a. m.	
Do.	do.	do.	19th,	do.	(9),	do.	do.	19th,	do.	9 a. m.	
Do.	do.	do.	21st,	do.	(10),	do.	do.	22d,	do.	9 a. m.	(Monday).
Do.	do.	do.	23d,	do.	(11),	do.	do.	23d,	do.	9 a. m.	
Do.	do.	do.	23d,	do.	(12),	do.	do.	23d,	do.	9 a. m.	
Do.	do.	do.	24th,	do.	(13),	do.	do.	24th,	do.	9 a. m.	
Do.	do.	do.	25th,	do.	(14),	do.	do.	25th,	do.	9 a. m.	
Do.	do.	do.	28th,	do.	(15),	do.	do.	29th,	do.	9 a. m.	(Monday).
Do.	do.	do.	30th,	do.	(16),	do.	do.	30th,	do.	9 a. m.	

I also annex copies of cables sent by me to Captain Burgess between October 5th and October 29th. They are as follows:

Cable	sent	Oct.	9th,	about	5 p. m.,	and	marked	(17).
Do.	do.	do.	10th,	do.	4 p. m.,	do.	do.	(18).
Do.	do.	do.	12th,	do.	3 p. m.,	do.	do.	(19).
Do.	do.	do.	18th,	do.	5 p. m.,	do.	do.	(20).
Do.	do.	do.	22d,	do.	5 p. m.,	do.	do.	(21).
Do.	do.	do.	23d,	do.	6 p. m.,	do.	do.	(22).
Do.	do.	do.	24th,	do.	7 p. m.,	do.	do.	(23).

All these cables were dispatches from Newcastle-on-Tyne.

(*d.*) I have attached to the said original cables received from Captain Burgess and to the said copies of cables sent by me to him, translations of the code words used therein. Scott's code was used by me and by Captain Burgess.

Sixth interrogatory. If, in answer to the fifth interrogatory, you annex a cable reading as follows:

"Accept tender £4,580, if lower impossible; no cure, no pay. Try include in agreement, if steamer after coming off not worth amount of salvage, steamer in damaged state to be taken in payment salvage."

state on what date, and as near as possible at what hour, you dispatched the said message, and from where.

In answer to interrogatory sixth he saith. This cablegram
191 was despatched by me on October 12th at about 3 p. m., from Newcastle-on-Tyne.

Seventh interrogatory. (*a.*) At the time you dispatched the cable referred to in the sixth interrogatory, had you received any communications from the captain or from other persons in regard to the situation of the *Elfrida*, other than the cables annexed to your answer to the fifth interrogatory?

(*b.*) If you had at that time received any other communications in regard to the situation of the *Elfrida*, annex the same to your answer to this interrogatory.

In answer to the seventh int. he saith: (*a.*) The only communication received by me up to 3 p. m. of October 12th, other than

those named in my reply to the fifth interrogatory, was a cable signed Moller, and received by me from Galveston on October 8th, at about 9 a. m.

(*b.*) This cable I annex, and is marked (24), and I append to the cable a translation of the code words; the code book used by Mr. Moller was Watkins'.

Eighth interrogatory. At the time of sending the said cable referred to in the sixth interrogatory, had you been informed of an alleged offer by these libelants to get the *Elfrida* off the beach for a sum which an American court of admiralty would allow without any agreement beforehand?

In answer to the eighth interrogatory he saith: At that time, namely, October 12th, I had not been informed by any one of an alleged offer made by the libelants to get the *Elfrida* off the beach for a sum which an American court of admiralty would allow. If I had known of this, I would have accepted such a mode of settlement.

Ninth interrogatory. (*a.*) At the time of sending the said cable referred to in the sixth interrogatory, were you aware that the steamer was lying head on the beach, and not broadside?

(*b.*) Did you know her draft and the depth of water she was lying in?

(*c.*) Did you know how much greater her draft would have been with her water ballast tanks pumped out, than the depth of the water in which she was lying?

192 (*d.*) Did you know to what extent sand was forming about her, or had formed about her, at the time of sending the said cable?

In answer to ninth interrogatory he saith: (*a.*) (*b.*) (*c.*) I did not know at that time any of the particulars stated in these questions.

(*d.*) I did not know at that time to what extent sand was forming about her, or had formed about her, the only information on that point in my possession being in Captain Burgess' cables annexed, marked 3, 4 and 5.

If I had been aware of the matters inquired of in this interrogatory, I would not have authorized acceptance of the tender.

Tenth interrogatory. (*a.*) Please state what information you relied on in sending the cable, "Accept tender £4,580, if lower impossible," &c., quoted in the sixth interrogatory.

(*b.*) Did you subsequently disaffirm the alleged contract made by Captain Burgess with the libelants, and, if so, what led you to do so?

In answer to tenth interrogatory, he saith: (*a.*) The information which guided me in coming to a decision to send this cable, was contained in the cables from the master, which I annex, and marked (1), (2), (3), (4) and (5), and my authority was given solely on the assumption that the matters stated in those cables were correct.

(*b.*) When I afterwards found there was reason to suppose that the matters contained in the cables were not correct, I disaffirmed the contract.

Eleventh interrogatory. If you had been informed that the vessel

was lying easy on a sand bottom, head on the beach, with hardly any perceptible accumulation of sand around her, in water less than a foot shallower at one end of her than her draft would have been with her water-ballast tanks empty, and that the weather was fine, with no immediate prospect of change, what would your judgment have been in regard to accepting the said tender of £4,580, made by the libelants for getting the steamer off?

In answer to interrogatory eleventh he saith: If I had known those facts I certainly would not have authorized the agree-
193 ment for such a large sum. The probability is that I would have cabled my counsel at New York, Messrs. Convers & Kirlin, to instruct a competent and trustworthy person to report on the situation.

Twelfth interrogatory. Explain the circumstances under which you sent the cables dated October 22d, 23d and 25th.

In answer to interrogatory twelfth he saith: The *Elfrida*, being largely insured in mutual insurance associations, in some of which I was a director, I was consequently daily discussing the *Elfrida's* case with my codirectors and with the secretaries and surveyors connected with the associations. After receipt of the cable on October 18th and marked (7) we had a suspicion that the degree of danger had been very much exaggerated. The insurance experts here, prior to Oct. 18th, had agreed that if the cables sent us by the master truly described the position of the boat, she could not possibly be floated into deep water in less than two or three months. After receipt of that cablegram on the 18th Oct., which was received by me about 4 p. m. of the 18th, I consulted the directors and the officials of the associations, and we agreed that there were grave reasons for strong suspicion as to the accuracy of the information cabled to us by the master, seeing that the *Elfrida* had been so quickly floated into deep water. On or about October 20th, I received the master's letter, dated October 7th, and marked (25), which seemed to us to materially qualify the impression produced by the master's cables, as the letter shows that she was not lying in a position which would be correctly described as critical, and she had apparently not received any material damage. The next few days were spent in discussing what was best to be done in order to release the ship; and my cable despatched on the evening of October 22d was prompted by a desire to elicit the feeling of the salvors as to releasing her at once while I was engaged in negotiating with my underwriters about payment. This release I thought they would agree to, as she was ordered to Newport News to dry dock, and besides she was under charter with Messrs. J. Moller & Co., and would in due course return to Velasco or Galveston to load.
194 Either before despatching the cable on the evening of the 24th (copy of which is marked 23), or shortly afterwards, I received the master's letter dated October 15th, and marked (26), which clearly conveyed to our minds that the salvors or other interested persons had been taking advantage of the isolated position of Capt. Burgess (Lloyd's agent not being able to be present to help him with advice) by informing him that the vessel was every day

getting into a more critical position on account of a bank forming around her. This cable of October 24th, marked (23), is what I apprehend is referred to in the interrogatory as dated October 25th, as this was the last cable I despatched to the master before he left with the *Elfrida* for Newport News.

Thirteenth interrogatory. (*a.*) Do you know or can you set forth any other matter or thing which may be of benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination or the matters in question in this cause?

(*b.*) If yea, set forth the same fully and at large in your answer.

In answer to interrogatory thirteenth he saith: (*a*) and (*b*). I understand from my counsel, Messrs. Convers & Kirlin, of New York, that it has been proved or will be proved that the vessel was lying easy on a sand bottom, head on the beach, with hardly any accumulation of sand around her, and that the weather was fine, with no immediate prospect of change, and the water where she lay was 7 feet forward and 9 feet aft, while her draught with the ballast pumped out would have been 9 feet forward and 9½ feet aft. If this information be anything like the actual facts, it appears to me that the master had been willfully misled by the salvors or other interested persons, and that acting under the false impressions conveyed to him as to the situation of the vessel and prospects of salving her, he unwittingly cabled me an erroneous view of the position. I have no hesitation in saying that had the matters referred to in the ninth and eleventh interrogatories been known to me, I would certainly not have authorized acceptance of the tender.

THOS. BELL.

195 *Cross-interrogatories to be Propounded to Thomas Bell, a Witness for Claimants.*

Cross-interrogatory 1. If, in answer to fourth direct interrogatory, you state the market value of the steamship *Elfrida*, after she was salved and taken into Velasco or Galveston, the latter part of October, 1894, state how you arrived at her value, whether from personal examination or from what you were told by others; and if you arrived at her value from what — were told by others, state who they were, giving their names, and whether you received your information from them verbally or in writing; and if in writing, append the writing, making it a part of this answer, and marking it plainly for identification.

In answer to the first cross-interrogatory, he saith:

From the time of her stranding at Velasco on October 5th up to the present time I have never considered the question of her market value after she was salved and taken into Velasco in the latter part of October. I can add nothing further to the answer I have given in answer to the fourth direct interrogatory.

Cross-interrogatory 2. If, in answer to direct interrogatory five, you say you received cables from Velasco or Galveston, in reference to the stranding of the *Elfrida*, please state what answers you returned

to said cables, if any, and if you have retained copies of answers to said cables, annex said copies to this answer, marking them plainly for identification.

In answer to the second cross-interrogatory, he saith:

2. I annex copies of all cablegrams despatched by me to the master of the *Elfrida* between the date of stranding, October 5th, and the date of her sailing from Velasco, October 29th, which telegrams are marked severally from 17 to 23, and the dates of which are given in my reply to the fifth direct interrogatory.

Cross-interrogatory 3. If, in answer to seventh interrogatory, you say you received communications from other persons besides the captain, please state whether or not you responded to said
196 communications, and if yea, annex a copy or copies of said answers to this interrogatory, marking them plainly for identification.

In answer to cross-interrogatory three he saith:

The only cables received by me between October 5th and October 29th, beyond those from the master, and one from Moller marked (24), and referred to in my reply to the seventh direct interrogatory, were the following:

From Moller, Galveston, dated October 20th and marked (27), received October 20, about 9 a. m.

From Moller, Galveston, dated October 23d, and marked (28), received October 23.

I annex copy of the only cable sent by me to Messrs. J. Moller & Co. while the *Elfrida* was at Velasco, namely, on October 25th, and marked (29), and which was a reply to his cable of Oct. 23d, and marked (28). I also received a letter from Messrs. J. Moller & Co., dated Oct. 9th, which I annex, and is marked (30). To this letter I replied on Oct. 17, and I annex copy, marked (31).

Cross-interrogatory 4. If you answer the ninth interrogatory in the affirmative, to wit, *b*, *c* and *d* of said interrogatory, state your means of knowledge, how it was acquired and on what facts you base your answer.

In answer to cross-interrogatory 4th he saith:

I can only repeat that I did not know nor even suspect the matters referred to in the ninth interrogatory at the time that I despatched my cable of October 12th. It is only recently that I have learnt these matters from my counsel Messrs. Convers & Kirlin, of New York.

Cross-interrogatory 5. Do you of your own personal knowledge know that the statements made in eleventh direct interrogatory to be true or not? Give your means of knowledge?

5. If in reply to the 8th interrogatory you say that you had not been informed of an alleged offer by libelants to get the *Elfrida* off the beach for the sum which an admiralty court in America would allow without any agreement beforehand, then state if it was not the duty of the master of the *Elfrida* to have advised you of
197 such offer, and is he not the person invested with the authority to receive and transmit such offers and generally to manage and control the vessel?

In answer to the 5th cross-interrogatory he saith:

I do not know anything as to the correctness of the statements made in the eleventh interrogatory of my own knowledge, the only information I have received being contained in letters from Messrs. Convers & Kirlin. I understand from them that they have been shown to be true in the evidence already taken. As stated in my reply to other interrogatories, I had not even a suspicion of these facts when I instructed the captain to accept the tender.

5. It was undoubtedly the master's duty to advise me of having received an offer to get the *Elfrida* off the beach for the sum which an admiralty court in America would allow without any agreement beforehand. At the time I authorized the acceptance of the tender I was under the supposition that the services would not be performed under any other agreement than a specific amount. The master did not even mention the circumstances in any of his letters.

6. If in reply to the 9th interrogatory you state that you were not aware of the matters therein inquired of at the time you sent the cable referred to in this question, then state why it was that Captain Burgess, of the *Elfrida*, had not advised you. Was it not his place to have done so, acting in your interest and in that of the vessel, and did you not rely upon the reports made by him, and upon his judgment and discretion?

In answer to the 6th cross-interrogatory he saith:

It was Captain Burgess's duty to cable me the information referred to in the 9th interrogatory, and I am at a loss to know why he neglected to do so. If he had done so, I would have adopted an entirely different line of action, and I can only regret that he neglected to disclose such important facts to me.

7. In answer to the 10th interrogatory give the names of any informants and attach to your answers the letters or cables which they sent you in full.

In answer to the 7th cross-interrogatory, he saith:

198 I had not received, up to the time of her leaving Velasco on October 29th, any communications whatever, other than those to which I have referred in the answers to the other interrogatories.

8. Is it not a fact that you relied upon the report made by Captain Burgess upon the advice received from Lloyd's agent in acting as you did?

In answer to the 8th cross-interrogatory, he saith:

The impression I have had for a long time is that Captain Burgess did not receive much advice from Lloyd's agent in consequence of the latter being too old and feeble to attend, and I have still the impression that Captain Burgess was left solely, or almost solely, to his own judgment in deciding what was best to be done during the time the *Elfrida* was stranded.

9. If you shall have said that you disaffirmed the contract made by Captain Burgess with the libelants, state when, where and how, and by what means you did so, and if by letters or cables attach copies thereof to your answers. If by conversation with any one, state with whom and give the time and place and circumstances.

In answer to the 9th cross-interrogatory, he saith:

In answer to this cross-interrogatory, I would refer to my cable of October 24th, a copy of which is marked (23), informing the captain that I had cabled Convers, New York, instructing him to lodge bail in order to effect the release of the *Elfrida*, and I also refer to the amended answer in this case. I do not annex any further letters or cables, as I am advised that communications to my counsel, Messrs. Convers & Kirlin, are privileged.

THOS. BELL.

Libelants except to the 4th interrogatory because any response thereto would be immaterial and irrelevant. The same objection is made to the 7th and 8th interrogatories.

They object to the 9th for the same reasons; and for further reason that if respondent or claimants did find for the information called for, it was not the fault of the libelants, nor should they suffer loss or their rights by prejudice, and the same are foreign to
199 any true issues in this case. Like objections are made to the 10th and 11th interrogatories and answers thereto as to whether or not claimants had the information referred to, as an immaterial issue. The same objections are made to the 12th interrogatory and to the thirteenth and to the last. And further objection is made that the question is too general to admit of cross-examination and should be stricken out.

J. H. WILSON AND
JAMES B. & CHARLES J. STUBBS,
Proctors for Libelants.

In the District Court of the United States for the Eastern District of Texas, at Galveston.

I, C. Dart, clerk of the district court of the United States for the eastern district of Texas, at Galveston, in the fifth circuit and district aforesaid, do hereby certify the foregoing to be a true and correct copy of direct and cross interrogatories propounded to Thomas Bell, a witness on behalf of respondent, filed February 4, 1895, in cause No. 672 on the admiralty docket of said court, entitled Charles Clarke & Co. *vs.* Steamship *Elfrida*, as the same now appears on file in my office.

To certify which, witness my hand and the seal of said court, at Galveston, in said district, this the 8th day of February, A. D. 1895.

C. DART,
[SEAL.] *Clerk U. S. District Court, E. D. T., at Galveston,*
By W. L. HANSCOM, *Deputy.*

(Endorsements:) "No. 672, A. D. United States district court, eastern district of Texas. Charles Clarke & Co. *vs.* The Steamship *Elfrida*. Copy of direct and cross interrogatories propounded to the respondent's witness, Thomas Bell."

200 UNITED STATES OF AMERICA, }
Eastern District of Texas. }

In U. S. District Court, at Galveston.

The President of the United States of America to the United States consul, vice-consul, or consular agent at Newcastle-upon-Tyne, England, Greeting:

Know ye that we, in confidence of your prudence and fidelity, have appointed you or either of you, and by these presents do give unto you full power and authority diligently to examine Thomas Bell of the firm of Pyman, Bell & Company, as a witness for the claimants, upon certain interrogatories propounded to him in a cause wherein Charles Clarke & Company are libelants and The Steamship *Elfrida*, her tackle, apparel, furniture, &c., Pyman, Bell & Co., claimants, are defendants, now pending in the district court of the United States for the eastern district of Texas, in the fifth circuit; and therefore we command that you, at certain days and places to be appointed by you for that purpose, cause the said witness to come before you and then and there examine the said Thomas Bell upon the said interrogatories and any cross-interrogatories (copies whereof are hereto annexed) on his corporal oath first taken before you upon the Holy Evangelists, or in such other solemn manner as is and may be authorized by law; and that you do take the answers of the witness to such interrogatories, and reduce the same to writing, which shall be signed and sworn to by the said witness; and you shall certify under your hand and seal that the same was signed and sworn to by the said witness before you, and shall seal them up in an envelope with the interrogatories and this commission, with your name across the seal, and endorse on the envelope the names of the parties to the suit and name of the witness, and direct the package to the "Clerk of the district court of the United States for the eastern district of Texas,
201 Galveston, Texas." If sent by mail the postmaster or his deputy mailing the same shall endorse thereon that he received them from the hands of the officer before whom they were taken.

Witness, the Honorable David E. Bryant, judge of the district court of the United States for the eastern district of Texas, and seal of said court, at the city of Galveston, this 8th day of February, in the year of our Lord one thousand eight hundred and ninety-five and of American Independence the 119th year.

C. DART,
Clerk U. S. District Court, Eastern District of Texas, at Galveston,
[SEAL.] By W. L. HANSCOM, *Deputy.*

(Endorsements:) No. 672. In U. S. district court, eastern district of Texas. Charles Clarke & Co. *vs.* Steamship *Elfrida*, &c. Commission. Issued 8th day of February, A. D. 1895. C. Dart, clerk, by W. L. Hanscom, deputy.

I hereby certify that the foregoing answers of the said witness to the direct and cross interrogatories hereto annexed and propounded to him in said cause were sworn to and subscribed before me by the said witness Thomas Bell.

In testimony whereof, I have hereunto set my hand and the seal of the United States consulate at Newcastle, England, this 26th day of February, 1895.

WM. L. CAMPBELL,
[SEAL.] *United States Consul, Commissioner.*

(Endorsements:) No. 672. United States district court, eastern district of Texas. Charles Clarke and others against The Steamship *Elfrida*, Pyman, Bell & Co., claimants. Executed commission. Fees, postage, and petties in executing this commission £6 0 0. W. L. Campbell, commissioner. Publication made at request of J. B. & C. J. Stubbs, proctors for libelant, in accordance with
202 agreement in writing & filed Oct. 17, '95. C. Dart, clerk, by W. L. Hanscom, dep't. Filed Oct. 17, 1895. C. Dart, clerk, by W. L. Hanscom, deputy.

(Endorsements on envelope:) United States consulate, Newcastle-upon-Tyne. No. 672. United States district court, eastern district of Texas. Charles Clarke and others against The Steamship *Elfrida*, Pyman, Bell & Co., claimants. Executed commission. C. Dart, Esquire, clerk of U. S. district court, Galveston, Texas, U. S. of America. Wm. L. Campbell, U. S. consul, commissioner (sealed). Registered. Registered A 27 Fe 95 Carlisle. New York, N. Y. Reg'y, div. 3/7, 1895. Galveston, Texas, Mar. 12, 1895. Notice Mar. 12, 1895. 9633. Received this package from the post-office at Galveston, Texas, March 12, 1895. C. Dart, clerk, by W. L. Hanscom, dep't. Filed March 12, 1895. C. Dart, clerk, by W. L. Hanscom, deputy. Publication made in accordance with agreement in writing and filed and at request of J. B. & C. J. Stubbs, proctor-for libelants, Oct. 17, 1895. C. Dart, clerk, by W. L. Hanscom, deputy.

EXHIBIT No. 1.

Produced by Witness. Wm. L. Campbell, Commissioner.

At 5.43 p. By D. B.
3.
Velasco, Texas.

Pyman, Newcastle:

(1) Sinecure Friday. (2) Scandal. (3) Signally. (4) Synopic. (5) Artillery.

Translation of the Above Code Words.

(1) The ship grounded at the entrance to the harbour.
(2) She is fast head and stern.
(3) The ship is in a critical position.
(4) Have sent for assistance.
(5) The ship was in charge of a Government pilot.

(Endorsements:) Correspondence & various documents in connection with *Elfrida's* stranding at Velasco, Oct., '94.

203 EXHIBIT No. 2.

Produced by Witness. Wm. L. Campbell, Commissioner.

5. At 4.34 p. m.
Velasco, 9.

Pyman, Newcastle:
Vessel same position. Lloyd's agent not arrived.
Elfrida, BURGESS.

EXHIBIT No. 3.

Produced by Witness. Wm. L. Campbell, Commissioner.

Velasco, Texas, 32.

Pyman, Newcastle:
Lloyd's agent here (1) serpent put ship *Galveston* including diver lowest bid forty-five eighty pounds Lloyd's and myself recommend acceptance vessel easy bottom sandy one thousand feet from deep water.
BURGESS, "*Elfrida*."

Translation of the Above Code Word.

(1) Advertised for tenders to get the ship afloat on the principle of "no cure no pay."

EXHIBIT No. 4.

Produced by Witness. Wm. L. Campbell, Commissioner.

At 4.4 p. By D.

Velasco, Tx.

Pyman, Newcastle:
Delay will cause danger of sand banking also increasing cost of floating.
Elfrida, BURGESS.

204 EXHIBIT No. 5.

Produced by Witness. Wm. L. Campbell, Commissioner.

At 8.14 a. m.

Velasco, 18.

Pyman, Newcastle:
Fresh breeze blowing—rough sea—vessel laying easy—making no water—afraid of sands—banking up.
Elfrida, BURGESS.

EXHIBIT No. 6.

Produced by Witness. Wm. L. Campbell, Commissioner.

At 8.17 a. m.

Velasco, 17.

Pyman, Newcastle:

Have accepted tender forty-five eighty, with right to abandon lower impossible. Commence work today.

Elfrida, BURGESS.

EXHIBIT No. 7.

Produced by Witness. Wm. L. Campbell, Commissioner.

At 3.57 p. By D.

Velasco, 6.

Pyman, Newcastle:

Elfrida floated; will survey.

BURGESS.

EXHIBIT No. 8.

Produced by Witness. Wm. L. Campbell, Commissioner.

At 8.40 p. By D.

Velasco, Texas, 18.

Pyman, Newcastle:

Moller advises underwriters refuse insure unless dry-docked; nearest dock Norfolk; instruct settlement salvage, also docking.

BURGESS, "*Elfrida.*"

205 EXHIBIT No. 9.

Produced by Witness. Wm. L. Campbell, Commissioner.

6. At 8.27 a. m.

Velasco, Texas, 19.

Pyman, Newcastle:

(1) Dolorous (2) diversely (3) dyspeptic expect tomorrow (4) license (5) declarable (6) redtail Norfolk impossible save charter Moller refuse accept until dry-docked.

Translation of the Above Code Words.

(1) The extent of the damage is not yet ascertained.
(2) The examination must be by diver.
(3) The diver cannot go down at present.
(4) The ship is quite tight.
(5) The ship will be surveyed tomorrow.
(6) The nearest place for repairs is ——.

EXHIBIT No. 10.

Produced by Witness. Wm. L. Campbell, Commissioner.

3. At 8.59 a. m.
Galveston, 20.

Pyman, Newcastle:

Vessel surveyed diver reports no damage slight indentation, Moller refuse accept unless dry-docked not necessary.

BURGESS.

EXHIBIT No. 11.

Produced by Witness. Wm. L. Campbell, Commissioner.

4. At 8.1 a. m.
Galveston, 23.

Pyman, Newcastle:

Have Lloyd's certificate, likewise surveyors' diverse report of sea-worthiness, will put vessel in berth, serve notice of ru-diness, await results.

Divers?
Readiness?

BURGESS, "*Elfrida.*"

206 EXHIBIT No. 12.

Produced by Witness. Wm. L. Campbell, Commissioner.

1. At 8.6 a. m.
Galveston, 20.

Pyman, Newcastle:

Salvors refuse to release ship until money is deposited Union bank, London, Limited, credit, Adoue & Lobit.

BURGESS, *Elfrida.*

From Anglo-Co. to Pyman, Bell & Co.

In your message yesterday morning, Galveston repeats. "Adoue."

From Sydney to Pyman, Bell & Co.

In No. 1. "Pyman," please read 15th text word. "Adoue."

EXHIBIT No. 13.

Produced by Witness. Wm. L. Campbell, Commissioner.

9. At 8.03 a. m.
Velasco, 19.

Pyman, Newcastle:

Charles Clark, R. P. Clark, Galveston, contractors, wreckers, notary form will not release until money deposited.

BURGESS, "*Elfrida.*"

EXHIBIT No. 14.

Produced by Witness. Wm. L. Campbell, Commissioner.

5. At 8 a. m.
Velasco, Texas, 11.

Pyman, Newcastle:
Ship arrested must sign release Galveston wire instructions.
BURGESS, "*Elfrida.*"

207 EXHIBIT No. 15.

Produced by Witness. Wm. L. Campbell, Commissioner.

6. 8.33 a.
Galveston, 8.

Pyman, Newcastle:
Vessel released sails Sunday, Hampton roads.
BURGESS, "*Elfrida.*"

EXHIBIT No. 16.

Produced by Witness. Wm. L. Campbell, Commissioner.

1. At 8.23 a. m.
Velasco, Texas.

Pyman, Newcastle:
Searching (sailed 29th).
BURGESS, "*Elfrida.*"

EXHIBIT No. 17.

Produced by Witness. Wm. L. Campbell, Commissioner.

Copy of Cablegram Sent by Pyman, Bell & Co., Newcastle-on Tyne, Oct. 9th, '94.

Steamer *Elfrida*, Velasco:

(1) (2) (3) (4) (5)
Gladdening speaker surgeon sexton governing.

Translation of Above Code Words (Scott's Code).

(1) How are matters progressing?
(2) What are the probabilities of the ship getting off?
(3) Is the ship much damaged?
(4) What is the nature of the ground where the ship struck?
(5) Keep us fully informed.

208 EXHIBIT No. 18.

Produced by Witness. Wm. L. Campbell, Commissioner.

Copy of Cablegram Sent by Pyman, Bell & Co., Newcastle-on-Tyne, Oct. 10th, '94.

Burgess, steamer *Elfrida*, Velasco:

Don't act without our instructions Lloyd's underwriters communicating direct as consider tender excessive try get condition in tender giving us right abandon vessel to salvors in lieu of salvage charges.

EXHIBIT No. 19.

Produced by Witness. Wm. L. Campbell, Commissioner.

Copy of Cablegram Sent by Pyman, Bell & Co., Newcastle-on-Tyne, Oct. 12th, '94.

Burgess, steamer *Elfrida*, Velasco:

Accept tender forty-five eighty if lower impossible no cure no pay try include in agreement if steamer after coming off not worth amount of salvage, steamer in damaged state to be taken in payment salvage.

PYMAN.

EXHIBIT No. 20.

Produced by Witness. Wm. L. Campbell, Commissioner.

Copy of Cablegram Sent by Pyman, Bell & Co., Newcastle-on-Tyne, Oct. 18th, '94.

Steamer *Elfrida*, Velasco:

When where survey (1) relishing and raftbridge (2) by Lloyd's can you save cancelling date roasted (3) which is nearest.

Translation of Above Code Words (Scott's Code).

(1) If the report of the surveyor (or diver) be favorable.
(2) Certificate of seaworthiness granted.
(3) Must the ship be put into dry dock?

209 EXHIBIT No. 21.

Produced by Witness. Wm. L. Campbell, Commissioner.

Copy of Cablegram Sent by Pyman, Bell & Co., Newcastle-on-Tyne, Oct. 22d, '94.

Steamer *Elfrida*, Galveston:

Arranging payment salvage London proceed Hampton roads.

EXHIBIT No. 22.

Produced by Witness. Wm. L. Campbell, Commissioner.

Copy of Cablegram Sent by Pyman, Bell & Co., Newcastle-on-Tyne, 23d Oct., '94.

Steamer *Elfrida*, Galveston:

Repeat joint names, describing who they are. Money ready, but underwriters wish know if salvage contract is on their form; and, pending receipt contract, wish money deposited joint names ourselves and salvors.

EXHIBIT No. 23.

Produced by Witness. Wm. L. Campbell, Commissioner.

Copy of Cablegram Sent by Pyman, Bell & Co., Newcastle-on-Tyne, 24th Oct., '94.

Steamer *Elfrida*, Galveston:

Have cabled Convers, lawyer, New York, instructing him lodge bail to release *Elfrida* immediately. Proceed Hampton roads. Must dock before loading.

210 EXHIBIT No. 24.

Produced by Witness. Wm. L. Campbell, Commissioner.

At 8.16 a. m. By Nic.

1. Galveston.

Pyman, Newcastle:

(1) (2) (3)
Elfrida stranded, Velasco breakwater, menterie invertebre Kreo-
(4)
sote ivican.

MOLLER.

Translation of the Above Code Words.

(1) She is beached.
(2) She is not out of danger yet.
(3) Assistance has been sent.
(4) She still continues tight.

EXHIBIT No. 25.

Produced by Witness. Wm. L. Campbell, Commissioner.

VELASCO, *Oct. 7th*, '94.

Messrs. Pyman, Bell & Co., Newcastle.

DEAR SIRS: Confirming my telegram of this date, I am very sorry to have to inform you of the vessel grounding on the bar, whilst

entering and remaining. We made a very successful passage up to the bar, we did not experience any of the cyclone that passed over the West Indies. On entering here the vessel struck the bar aft and fell athwart the channel grounding on the side of the sunken breakwater (or the breakwater that was formerly) remaining there in a very perilous position; we tried every means in our power to get the vessel off, by running anchors away. I also sent up to Velasco for a tug, but she did not come to our assistance before Saturday morning, when she could do nothing for us, the wind having been blowing from the eastward strong all night causing a big sea on
211 the bar. When I saw that they did not come off I launched our lifeboat and after a great deal of trouble and risk (on account of the big sea running), I managed to get into the harbour, and induced them to come off and run an anchor away, the coast guard lifeboat being in attendance all the time. The sea being so rough and the tug not being strong they could not do anything more for us that night. At about 9 p. m. Saturday a big sea running the vessel showed indications of driving up on to the end of the visible breakwater. I hove on the anchor and tried to get her into a safer position, but on account of the sea running the vessel worked herself right over the breakwater, and up onto the beach alongside of breakwater, head into shore. We lost an anchor and about 30 fathoms chain in trying to keep her from the beach, the cable breaking. She now lies on the beach in a better position and not so liable to do so much damage. When the weather moderates we will have another try to float her. I have telegraphed Moller, Galveston, to inform Lloyd's, as there is no means of assistance here. I came on shore this morning in the coast gaurd lifeboat and after a lot of trouble we managed to land on the beach. I don't think the vessel is damaged to a very large extent, in fact up to my coming on shore there was no sign of water anywhere. We expect Lloyd's agent here tonight or morning from Galveston.

I remain,

Your obedient servant,

BENJ. BURGESS (*Master*).

P. S.—The vessel was in charge of Government pilot at the time of stranding.

212 EXHIBIT No. 26.

Produced by Witness. Wm. L. Campbell, Commissioner.

VELASCO, *Oct. 15th*, '95.

Messrs. Pyman, Bell & Co., Newcastle.

DEAR SIRS: Enclosed please find the form of contract made between Chas. Clarke & Co. and myself on your behalf, approved by Lloyd's agent. The salvors are contractors of Galveston. In reference to your telegram to accept less was impossible, salvors maintaining that vessel was every day getting into a more critical position on account of bank forming round her. Lloyd's agent at Galveston, being a very old and feeble man, was not able to be present at the signing of the

contract, but wired that the form made up was legal before a notary. I protested about vessel stranding likewise, with the right to extend at any time hereafter. Will write again later fuller particulars.

I remain,

Your obedient servant,

BENJ. BURGESS (*Master*).

THE STATE OF TEXAS, }
County of Brazoria. }

This agreement made and entered into this 15th day of October, 1894, between the steamship *Elfrida* and the owners thereof, represented herein by B. Burgess, master of said steamship, as party of the first part, and Charles Clarke & Co., of Galveston, Texas, as party of the second part.

Witnesseth, that for and in consideration of the covenants and agreements herein contained on the part of the said party of the first part, to be kept and performed, the said party of the second part hereby agrees and binds himself, his administrators and assigns, to float and place in a safe anchorage, Quintana or Galveston, as directed, the S. S. *Elfrida*, which is now stranded west of, and
213 near to, the west jetty at the mouth of the Brazos river, in said county and State, to furnish all labor and material at the cost of said party of the second part, and to furnish diver and necessary apparatus to survey or examine the bottom of said steamship and to complete the same within twenty-one (21) days from date hereof.

The said party of the first part agrees to pay to the said party of the second part, for such services, *i. e.*, when he shall have successfully floated said ship, as above set forth, the sum of twenty-two thousand dollars ($22,000). The said party of the first part, however, reserving the right hereby to abandon the ship to and in favor of the said second party, in lieu of the said amount of $22,000, agreed to be paid as aforesaid.

It is further understood and agreed by and between the parties hereto, that a failure to float and place in a position of safety as above stated, said steamship within the time hereinbefore specified, to wit, 21 days from date hereof, that said party of the second part shall receive no compensation whatever from said first party for work performed, labour, tools or appliances furnished.

Anything that may be discharged to enable vessel to float, shall be replaced when she is in a position of safety. It is also agreed and understood that the use of crew and engine shall be at the use and disposal of said party.

Witness the hand of B. Burgess, master of the steamship *Elfrida*, for himself, said ship and the owners, party of the first part, and the hand of Charles Clarke & Co., party of the second part, this fifteenth day of October, 1894.

BENJ. BURGESS.
CHAS. CLARKE — CO.

Witness-:
M. P. MORRISSEY.
J. H. DURKIE,
Master S. S. Lizzie, of Whitby.

214 EXHIBIT No. 27.

Produced by Witness. Wm. L. Campbell, Commissioner.

5. At 8.25½ a. m. By Nic.
Galveston, 13.

Pyman, Newcastle:

All underwriters refuse *Elfrida* until docked and Lloyd's surveyed.

MOLLER.

EXHIBIT No. 28.

Produced by Witness. Wm. L. Campbell, Commissioner.

4. At 8½ a. By Nic.
Galveston, 9.

Pyman, Newcastle:

(1) (2) (3)
Elfrida topbin expenses about turbiedad tambor.

MOLLER.

Translation of the Above Code Words.

(1) May captain draw *on* you at 3 days sight?
(2) £250.
(3) The advance is not insured; please cover it.

EXHIBIT No. 29.

Produced by Witness. Wm. L. Campbell, Commissioner.

Copy of Cablegram Sent by Pyman, Bell & Co., Newcastle-on-Tyne, 25th Oct., '94.

Moller, Galveston:

(1) (2) (3) (4) (5)
Elfrida tonillo about turbiedad binocle carded siliculose when
(6)
released voiture before loading.

Translation of Above Code Words (Watkins' Code).

(1) Draw on us for disbursements at sight
(2) £250
(3) Instruct captain to
(4) proceed to
(5) Hampton roads for orders.
(6) She must go into dry dock and have bottom examined.

215 EXHIBIT No. 30.

Produced by Witness. Wm. L. Campbell, Commissioner.

GALVESTON, *Oct. 9th*, '94.

Messrs. Pyman, Bell & Co., Newcastle-on-Tyne, S. S. *Elfrida.*

DEAR SIRS: We regretted very much the necessity of cabling you on the 7th inst. the mishap to the *Elfrida.* From the information at hand the vessel in trying to make the port of Velasco on the 5th inst., struck the seaward end of the western jetty at the entrance to that port, and as far as we understand the matter, it seems that the pilot misjudged the force of the wind and current in not getting the ship far enough to windward in the channel between the jetties.

We have not seen the master of the ship, inasmuch as he wishes to remain at the scene of action until Lloyd's agent arrives there, which will be today. Our clerk at Velasco writes us as follows:

"Ship's grounding was entirely on account of poor judgment on the part of the pilot in attempting to enter while swift wind and current were setting westward and a heavy swell on the bar. As soon as the vessel touched bottom her head fell off and she drifted on the jetties at once; where she fetched up there is only a foundation of rock covered over by brush and sand, so it is not supposed the vessel has received any injury to her bottom, although such cannot be ascertained until her water ballast is pumped out. She swung around the outer end of the jetty where she fetched up on a sandy beach, where she now lies stern to sea in 9 feet of water and 6 feet at stem. With her full water ballast on board she lies firmly imbedded in sand, and does not of course move."

This is practically all the information we have to hand so far.

216 Velasco is situated 40 miles south of Galveston, at the mouth of the Brazos river. We suppose Captain Burgess has already notified you with as many particulars as he could give, inasmuch as he can cable you direct from Velasco. We expect him together with Lloyd's agent here tomorrow, when some steps will doubtless be taken (after a proper survey has been held) to heave the vessel off. We fear, however, this will be rather a tedious job, as she has to be forced through the sand out to deeper water, which is a precarious piece of work, as strong on-shore winds occasionally spring up creating considerable swell, at which time work will have to cease.

We are not sure if local wreckers here will be able to get the vessel off, and it may become necessary to procure help from the Merritt Wrecking Co., or similar institutions. We will, however, inform you regularly what progress is being made.

We exceedingly regret this mishap, especially as we had the cargo ready for the vessel and intended to load her for London and Leith.

Without further to note, we remain, your- faithfully,

J. MOLLER & CO.

EXHIBIT No. 31.

Produced by Witness. Wm. L. Campbell, Commissioner.

NEWCASTLE-ON-TYNE, 17*th October*, '94.

Messrs. J. Moller & Co., Galveston.

DEAR SIRS: Since the *Elfrida* got onto the sand bank near Velasco harbour on the 5th inst., we have been hoping to hear of her being got off and the bottom examined by divers in time to save her cancelling date. The latest news, however, shows that there is no hope whatever of her saving her charter, and we shall be pleased to hear from you as to your decision after she has been taken into Galveston under the contract which Captain Burgess and Lloyd's agent have made with the salvage Co. May we ask you to kindly
217 give Captain Burgess your best advice upon any points upon which he may consult you, and we shall feel obliged by your advancing him any money he may require for disbursements, taking his draft upon us in payment.

Thanking you in anticipation, we remain, dear sirs,

Yours very truly,

(S'g'd) PYMAN, BELL & CO.

Exceptions by Libelants to Deposition of Thomas Bell.

Filed October 21, 1895.

In United States District Court for the Eastern District of Texas, at Galveston.

CHAS. CLARKE & Co.
vs.
THE STEAMSHIP "ELFRIDA," HER TACKLE, &c. } A. D., No. 672.

Now come libelants in above cause, and except to certain interrogatories to and answers of Thomas Bell, a witness for respondents, as follows:

1. They except to the fourth interrogatory and its answers, because it appears therefrom that the witness is testifying from hearsay, and no sufficient predicate is laid by him for the expression of his estimate of the value of the *Elfrida* when she was salved and taken into Velasco, nor after she had been repaired.

218 2. To the eighth interrogatory and its answer, because it is immaterial to the issues herein whether witness knew of an offer made by libelants to get the *Elfrida* off the beach for such sum as the courts would allow him, and what he would have done if he had known this is entirely irrelevant and foreign, self-serving and inadmissible.

3. To the ninth interrogatory and all of its answer which states that if the witness had been aware of the matters inquired of he would not have authorized acceptance of the tender, because of the same objections urged in the last exception, and because it is not

competent for a witness to undertake to say at this time what he would have done under certain conditions at a former time, and his hypothetical action is not evidence, or in any way relevant.

4. The same objections as urged in the two preceding paragraphs are renewed to the 10th interrogatory and its answers. It is immaterial whether the witness's authority was given on the assumption that the matter- stated in those cables were correct or not, or what his suppositions were, as he is bound by the acts of his agent acting within the real or apparent scope of his authority, and the master was such agent.

5. Without repeating the objections urged in the three last paragraphs, they are renewed to the 11th and 12th interrogatories and their answers, and they also except to those parts of the answer to the 12th interrogatory setting out the discussions, consultations and conversations which the witness had with people in England, and their opinions and suspicions, as well as his, and they also except to any testimony as to the impressions produced upon the witness by letters or cables from his master, and they except to all mere conjectures, opinions and hearsay evidence set out in this witness's answers as being incompetent, irrelevant, immaterial and inadmissible.

219 6. They further except to the 13th interrogatory and its answer, because the question is too general to permit of a cross-examination, and is improper to be put, and the answer simply repeats what the witness had heard from his counsel, which of itself was mere hearsay and not admissible, and also his impressions and judgment, and what he would have done under certain conditions. The same objections heretofore made are renewed to this question and its answer.

7. Libelants also object to the statements in the answers to the 4th, 5th, 6th and 8th cross-interrogatories, because obviously based upon information received from others, and not upon the personal knowledge of the witness, and for the objections heretofore stated to other questions and answers, and because any cables or transactions between the witness and the master of his vessel are not binding upon these libelants, they not being shown to be present or participating therein, and evidence as to the witness's supposition is likewise incompetent.

8. They further object to the admission in evidence of said deposition, because they were not returned in the manner provided by law, there not appearing to be the name of any witness upon the envelope, nor the receipt of the postmaster to the officer taking the deposition as required by law.

Wherefore, libelants pray that said deposition be stricken out.

JOS. H. WILSON,
JAS. B. & CHAS. J. STUBBS,
Counsel for Libelants.

Endorsements: A. D., No. 672. Chas. Clarke & Co. *vs.* The S. S. *Elfrida*, her tackle, &c. Exceptions to depositions of Thos. Bell. Filed Oct. 21, 1895. C. Dart, clerk.

22—308

220 CHARLES CLARKE & Co. *vs.* STEAMSHIP "ELFRIDA." } A. D., No. 672.

Deposition of J. C. Smith, a witness on behalf of respondents, taken, upon interrogatories and cross-interrogatories and commission, before Morgan M. Mann, notary public, Galveston county, Texas; sworn to in Galveston county February 26, 1895.

Interrogatories Propounded to J. C. Smith, a Witness for Claimants.

Int. 1. What is your age, name, residence and business?

To the 1st interrogatory he answers:

My age is 40 years; my name, Judson C. Smith; my place of residence, No. 1909 Avenue K, Galveston, Texas; my business is that of office manager of the Western Union Telegraph Company at Galveston, Texas.

Int. 2. What was your business in September, October and November, 1894? If you say you were employed by any persons or corporation, you will then please state by what persons or corporation, in what capacity you were employed during such time, and whether or not you are still so employed.

To the 2d interrogatory he answers:

In September, October and November, 1894, my business was that of office manager of the Western Union Telegraph Co. at Galveston. I was employed by the Western Union Telegraph Co. as office manager of the Galveston, Texas, office, and am still so employed.

Int. 3. If in answer to the last interrogatory you say you are now employed by the Western Union Telegraph Company, you will then please state in what capacity, and whether or not you have charge of its office records and papers at Galveston, Texas.

221 To the 3d interrogatory he answers:

In the capacity of office manager. I have charge of the office, and of all papers and records of the office.

Int. 4. You will please state whether or not the Western Union Telegraph Co., on or about the 12th day of October, 1894, received at Galveston, and afterwards transmitted to Velasco, via Chenango, and delivered to Benjamin Burgess, or any one for him in Velasco, a cablegram, of which the following is a substantial copy:

NEW CASTLE, TYNE.

Burgess, steamer *Elfrida*, Velasco:

Accept tender forty-five eighty, lower if possible. No cure no pay. Try include in agreement, if steamer after coming off not worth amount of salvage, steamer in damaged state to be taken in payment of salvage.

"PYMAN."

If you say yes, you will then state whether or not the above is a correct copy, and if not, then give a correct copy. If you have any record of such fact, you will please also state the date and hour such cablegram was received at Galveston and at Velasco; to whom it

was delivered at Galveston and Velasco, giving name of person or persons it was delivered to, also giving date and hour said cablegram was receipted for, and who signed the receipt for the cablegram.

To the 4th interrogatory he answers:

I am unable to find a cablegram of October 12, 1894, from New Castle, Tyne:

"Burgess, steamer *Elfrida*, Velasco:

Accept tender forty-five eighty, lower if possible. No cure no pay. Try include in agreement if steamer after coming off not worth amount of salvage, steamer in damaged state to be taken in payment of salvage.

(Signed) PYMAN."

As before stated, I can find no record of such cablegram.

Int. 5. You will please state whether or not the Western Union Telegraph Co., at Galveston, Texas, at or about the time it received the cablegram referred to in the foregoing interrogatories, received via Chenango from Velasco, a telegram from Mr. Morrissey,
222 of Velasco, the agent of J. Moller & Co., or from J. Moller & Co., Velasco, directed either to J. Moller & Co., or Chas. Clarke & Co., or Chas. Clarke, or Fred. Brock, at Galveston, Texas, having reference to the cablegram or subject-matter therein referred to, set out in the foregoing interrogatory, and if so, attach the original to your answer to this interrogatory and mark it for identification. If you cannot attach the original, please state what efforts you have made to procure the original, and in the event you cannot procure the original, you will then attach a copy and state whether it is a true copy or not, and state what the contents of the original was. You will alse please state who it was signed by and how it was directed, give the date and hour it was received in your office at Galveston.

To the 5th interrogatory he answers:

The alleged telegram or telegrams inquired for in this interrogatory are not sufficiently described as to date and wording to enable me to testify or produce. I have made no efforts to procure the original for the foregoing reasons.

Int. 6. You will please attach any and all telegrams sent by Mr. Morrissey or J. Moller & Co. to Fred. Brock, Chas. Clarke, J. Moller & Co. or Chas. Clarke & Co., from Velasco, and received in your office at Galveston, Texas, on the 11th, 12th, 13th, 14th days of October, 1894. If you cannot attach the originals you will please then state why you cannot attach the originals and what effort you have made to procure the originals, and in the event you cannot procure and attach the originals hereto you will please attach a copy or copies of the originals and state whether they are true copies or not.

To the 6th interrogatory he answers:

I refer you to my answer to the 5th interrogatory.

Int. 7. Will you please state whether or not there was delivered

to your office at Galveston, on or about October 12, 1894, a telegram of which the following is a substantial copy:

Captain Burgess, steamship *Elfrida*, Velasco, Texas:

Contract price agreed upon. Will get things ready to start.
CHAS. CLARKE.

223 If so, you will please attach such telegram to your answer to this interrogatory, and mark it for identification, and if you no longer have the original, but a copy, then please attach such copy to your answer, and say whether or not it is a true copy of such original telegram. Please give the day and hour on which such telegram was received for transmission, and please give the day and hour on which it should have been received in Velasco, had it been transmitted in due course, and please state further whether it was transmitted in due course.

To the 7th interrogatory he answers:

Such a telegram was delivered, and a true copy is hereto attached, marked "Exhibit A" for identification. The telegram was filed at 8 p. m., October 12, 1894. I am not familiar with the office hours at either Chenango Junction or Velasco. As a rule, offices of the size of Chenango or Velasco are closed by 8 p. m., and I do not think this telegram should have reached Velasco before the following morning. It may, however, have done so. The telegram was promptly transmitted from this office and in due course.

Int. 8. You will please attach the originals of any and all telegrams delivered by Fred. Brock, Chas. Clarke, J. Moller & Co. and Chas. Clarke & Co. to the Western Union Telegraph Co., at Galveston for J. Morrissey or J. Moller & Co., Velasco, on the 11th, 12th, 13th and 14th days of October, 1894.

If you cannot attach the originals, you will please say why you cannot do so, and what effort you have made to procure the originals, if any, and in the event you cannot procure and attach the originals hereto please attach copies of the originals, and state whether they are true copies or not.

To the 8th interrogatory he answers:

I refer you to my answer to the 5th interrogatory.

J. C. SMITH.

224 *Cross-interrogatories to be Propounded to J. S. Smith and Artie Vaughan.*

1. If you have not answered all the questions of your own knowledge, but have answered some of them upon information received, please state from what person or source you obtained such information, giving names and the times and places that you were so informed.

To the 1st cross-interrogatory he answers:

I have answered from my own information.

2. Was not the telegram or cablegram which was addressed to Burgess, and purported to come from Newcastle, Tyne, and signed

Pyman, in cypher? And if you state that it was so, state whether or not you had it translated, and if so by whom.

To the 2d cross-interrogatory he answers:

I know nothing of this telegram or cablegram.

3. To Vaughan only: Please state who had access to the telegraph office at Velasco, and who had charge of its records, and who received and delivered the messages, and if you state that any one besides yourself was employed for either purpose, state who it was, and state who delivered messages directed to Captain Burgess, or any other person acting for the S. S. *Elfrida*, and who sent or received messages for Charles Clarke & Co., or Charles Clarke or Fred. Brock.

To the third cross-interrogatory he answers:

This interrogatory is not for me.

4. To both: Do you, either of you, know anything of the circumstances under which the S. S. *Elfrida* went ashore or was stranded, and the arrangement by which she was gotten off, and the danger, if any, to which she was exposed while stranded or beached? If so, please state all the facts that you know.

To the 4th cross-interrogatory he answers:

I do not know anything of the circumstances.

5. Is it not a fact that said steamer was in a perilous posi-
225 tion, and if the weather had been severe, or a storm had arisen, that she would probably have been a total loss? And was it not due to the effort of Chas. Clarke & Co. that she was rescued from the danger to which she was exposed? And is it not a fact that stormy or rough weather came on just after she had been afloat, and that if she had remained aground she would have been wrecked?

To the 5th cross-interrogatory he answers:

I do not know.

6. Did not the pilots and others acquainted with the dangers of the coast and not interested in the salvage contract strongly advise the master of the *Elfrida* to enter into a contract which he made with Chas. Clarke & Co. for pulling the vessel off? If so, state all the particulars you may know in regard to the matter.

To the 6th cross-interrogatory he answers:

I do not know.

J. C. SMITH.

EXHIBIT "A."

Receiver's No., 432. Time filed, 8 p. m. Check, 10 paid, via Chenango.

GALVESTON, TEX., *Oct.* 12, 1894.

To Captain E. Burgess, steamship *Elfrida*, Velasco, Texas:

Contract price agreed upon. Will get things ready to start.

CHAS. CLARKE & CO.

399 Ho. 759 P. E. W.'s.

226 CHAS. CLARKE & Co. *vs.* S. S. "ELFRIDA." } In Admiralty. No. 672.

Deposition of Arthur H. Vaughan, a witness on behalf of respondents, taken upon interrogatories and cross-interrogatories and commission, before Frank E. Jones, a justice of the peace and *ex officiary* notary public, Brazoria county, Texas; sworn to in Brazoria county March 14, 1895.

Interrogatories to be Propounded to Artie Vaughan, a Witness for Claimants.

Int. 1. What is your age, name, residence and business?

To 1st interrogatory he answers:

I am 17 years of age. My name, Arthur H. Vaughan. Residence in Velasco, Texas. Business, telegraph operator.

Int. 2. What was your business in 1894? If you say you were employed by any person or corporation, you will then please state by what person, or what corporation, and in what capacity you were employed during that time. State whether or not you are still so employed.

To 2nd interrogatory he answers:

Telegraph operator for Velasco Terminal R'y Telegraph Co. Employed by G. W. Angle, general manager of V. T. R'y Co., as telegraph operator. Am still employed by said corporation as telegraph operator.

Int. 3. If, in answer to the last interrogatory, you say you were then and are now employed by the Velasco Terminal R. R. Co., you will then please state in what capacity, and whether or not you have charge of its telegraph office, records and papers at Velasco, Texas? If you have not, then please state who has.

To 3rd interrogatory:

227 I am employed by general manager of said V. T. R'y Co. as telegraph operator. I have charge of the telegraph office, records and papers at Velasco, Texas.

Int. 4th. You will please state whether or not the Velasco Terminal R. R. Co. on or about the 12th day of October, 1894, received at Velasco and delivered to Benjamin Burgess, or any one for him in Velasco, a cablegram, of which the following is a substantial copy:

NEW CASTLE, TYNE.

Burgess, steamer *Elfrida*, Velasco:

Accept tender forty-five eighty, lower if possible. No cure no pay. Try include in agreement if steamer after coming off, not worth amount of salvage, steamer in damaged state to be taken in payment of salvage.

"PYMAN."

If you say yes, you will then state whether or not the above is a correct copy, and if not, then give a correct copy. If you have any record of such fact, you will please also state the date and hour such cablegram was received at Velasco; to whom it was delivered at

Velasco, giving the name of the person or persons it was delivered to, also giving date and hour such cablegram was receipted for, and who signed the receipt for the cablegram. If you have no personal knowledge of the facts inquired about, but have access to the records of said office, then please examine such records, and state what they disclose concerning the facts herein inquired about.

To fourth interrogatory he answers:

Yes; I received cablegram from New Castle, Tyne, addressed B. Burgess, steamer *Elfrida*, Velasco, Tex., and signed Pyman, a copy of which I herewith submit. The above is not a correct copy. The cablegram I received read as follows:

"NEW CASTLE, TYNE.

To Burgess, stmr. *Elfrida*, Velasco:

Accept tender forty-five eighty, if lower impossible. No cure no pay. Try include in agreement if steamer after coming off not worth amount salvage, steamer in damaged state to be taken in payment salvage.

(Signed) PYMAN."

228 The above cablegram was received at 1.40 p. m. on October 12, 1894, and delivered to Capt. Burgess. I don't remember at what hour it was delivered, but know it was on same day that said cablegram was received.

After having examined my delivery record, that cablegram was delivered to Capt. B. Burgess, was delivered at about 2 p. m. on October 12, 1894. Receipted by Capt. B. Burgess.

Int. 5th. You will please state whether or not the cablegram referred to in the last interrogatory was first sent to Galveston and then repeated to Velasco, or did it come direct to Velasco?

To 5th interrogatory he answers:

The cablegram referred to came direct to Velasco.

Int. 6th. You will please state whether or not the Velasco Terminal R. R. Co., at Velasco, Texas, at or about the time it received the cablegram referred to in the foregoing interrogatory, received a telegram from Mr. Morrissey, of Velasco, the agent of J. Moller & Co., or from J. Moller & Co., Velasco, directed either to J. Moller & Co. or Chas. Clarke & Co., or Chas. Clarke or Fred Brock, at Galveston, Texas, having reference to the cablegram or the subject-matter thereof referred to in the foregoing interrogatories, and, if so, attach the original to your answer to this interrogatory, and mark it for identification. If you cannot attach the original, please state what effort you have made to procure the original, and in the event you cannot procure the original, you will then attach a copy, or copies, and state whether or not they are true copies, and state what the contents of the original was.

You will also please state by whom it was signed, and how it was directed; give the date and hour it was received in your office at Velasco. If you cannot answer from your own knowledge, then please answer from said records.

To 6th interrogatory he answers:

The V. T. Ry. Co. at Velasco, Tex., did receive at or about the

time it received the cablegram referred to a telegram from Mr. Morrissey to J. Moller & Co., Galveston, Texas, having reference to the subject-matter in the foregoing cablegram, a copy of
229 which I hereby submit, and mark it "No. 2" for identification, which is a true copy of the original. The original was as follows:

"VELASCO, TEX., 10/12/94.

J. Moller & Co., Galveston:

Pyman cables accept Clarke's bid; tell him better get here quickly. Answer.

(Signed) M. P. MORRISSEY."

It was signed by M. P. Morrissey, directed "J. Moller & Co., Galveston, Tex." Hour received, 2.15 p. m. Dated Oct. 12, '94.

Int. 7. You will please attach any and all telegrams sent by Mr. Morrissey, or J. Moller & Co., from Velasco, Texas, to Fred Brock, Chas. Clarke, J. Moller & Co., or Chas. Clarke & Co., at Galveston, Texas, on the 11th, 12th, 13th and 14th of October, 1894. If you cannot attach the originals, you will please state why you cannot attach the originals and what effort you have made to procure the originals, and in the event you cannot procure and attach the originals hereto, you will please attach a copy or copies of the originals, and you will please say whether or not they are true copies.

To 7th interrogatory he answers:

I cannot furnish the originals. Reason: General manager will not permit my taking same out of office, but I herewith submit and furnish true and correct copies of all telegrams sent by parties named, or any of them, on the 11th, 12th, 13th and 14th of October, 1894, to parties named, or any of them. For identification the telegrams are marked "2, 3, 4, 5 and 6," and the copies are correct and true with the originals.

Int. 8. You will please state whether or not there was delivered to your office at Velasco, Texas, on or about October 12, 1894, a telegram of which the following is a substantial copy:

Captain Burgess, steamship *Elfrida*, Velasco, Texas.

Contract price agreed upon. Will get things ready to start.

CHAS. CLARK.

If so, you will please attach such telegram to your answer to this interrogatory and mark it for identification, and if you no longer have the original, but a copy, then please attach such
230 a copy to your answer, and say whether or not it is a true copy of such original telegram. Please give the day and hour on which the telegram was received; also the date and hour it was delivered. State to whom it was delivered, giving the date and hour. Also state who receipted for it, and the date and hour it was receipted for.

To 8th interrogatory he answers:

Yes, I received telegram at 8 a. m. on October 12, 1894, from

Chas. Clarke & Co., Galveston, addressed to Capt. B. Burgess, steamship *Elfrida*, Velasco, Texas, of which following is a copy:

"GALVESTON, TEX., 12TH.

Capt. B. Burgess, S. S. *Elfrida*, Velasco.

Contract price agreed upon—get things ready to start.

(Signed) CHAS. CLARKE & CO."

A copy of which I herewith submit and mark "No 7" for identification. Above telegram was received on October 12, 1894, at 8 a. m., and delivered to and receipted for by Captain Burgess on same date, 12th October, 1894, at 8.45 a. m.

Int. 9th. You will please attach the originals of any and all telegrams sent by Fred Brock, Chas. Clarke, J. Moller & Co. and Chas. Clarke & Co., through the Western Union Telegraph Co., at Galveston, and your company, for J. Morrissey, or J. Moller & Co., Velasco, on the 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th and 14th days of October, 1894. If you cannot attach the originals, you will please say why you cannot do so, and what effort you have made to procure the originals, if any, and in the event you cannot procure and attach the originals hereto, please attach copies of the originals, and state whether or not they are true copies.

To 9th interrogatory he answers:

I cannot furnish nor attach originals nor copies of any telegrams or cablegrams from the Western Union Telegraph Co.'s office in Galveston to J. Morrissey or J. Moller & Co., Velasco, received on 5th to 14th days of October, 1894, inclusive. General manager will not permit me to do so, or to furnish any copies, except those named and specified in *subpœna duces tecum;* which was served upon me 13th day of March, 1895.

231 Int. 10th. Do you know J. Morrissey, a citizen of Velasco, Texas? If so please state what his business was on October, 1894; for whom he was working in October, 1894. Was he or not employed by the Velasco Terminal R. R. Co. in October, 1894; if so, in what capacity.

10th interrogatory he answers:

I do not know J. Morrissey. I know M. P. Morrissey, a citizen of Velasco, Texas. I do not know what J. Morrissey's business was in October, 1894. I know that J. Morrissey was not employed by Velasco Terminal Railway Co. in October, 1894.

Int. 11. Did the Western Union Telegraph Co. have an office or do business in Velasco, Texas, in October, 1894, or not? If you say the Western Union Telegraph Co. did not have an office in Velasco, Texas, in October, 1894, you will then state whether or not it did business there in the way of receiving or sending telegraph and cablegram messages for others, and if you say that it did, you will then please state who was its agent or agents and by or through whom did it do such business. If you say that the Western Union Telegraph Co. did have an office in Velasco in October, 1894, you will then please state who was the agent or manager of such office.

11th interrogatory he answers:

No, the Western Union Telegraph Company did not have an office or do business in Velasco, Tex., in October, 1894. It received messages and sent messages for others through the Velasco Terminal Railway Telegraph Company, at Velasco, Texas. It had no direct agent here, but did business through the V. T. R'y Telegraph Co.

Int. 12. State whether or not J. Morrissey is a telegraph operator capable of receiving and sending telegrams. State whether or not he is connected with the Velasco Terminal R'y Co., and if so, in what capacity. State where his office is located with reference to the telegraph office of said R'y Co.

12th interrogatory he answers:

I don't know J. Morrissey or whether he is capable of sending or receiving telegrams or not. He is not connected with the Velasco Terminal Railway Company.

ARTHUR H. VAUGHAN.

Sworn and subscribed to before me this 14th day of March, 1895.

FRANK E. JONES,

[SEAL.] *J. P., ex Officio N. P.*

232 *Cross-interrogatories to be Propounded to J. S. Smith and Artie Vaughan.*

1. If you have not answered all questions of your own knowledge, but have answered some of them upon information received, please state from what person or source you obtained such information, giving names and the times and places that you were so informed.

To 1st he answers:

I have answered all questions of my own knowledge.

2. Was not the telegram or cablegram which was addressed to Burgess, and purported to come from New Castle, Tyne, and signed Pyman, in cipher? And if you state that it was so, state whether or not you had it translated, and if so by whom.

2d X Int. he answers:

The cablegram which came to Burgess from New Castle, Tyne, dated October 12, 1894, marked "1," was not in cipher.

3. To *Vaughan* only: Please state who had access to the telegraph office at Velasco, and who had charge of its records, and who received and delivered the messages, and if you state that any one besides yourself was employed for either purpose, state who it was, and state who delivered messages directed to Capt. Burgess, or any other person acting for the steamship *Elfrida*, and who sent or received messages for Charles Clarke & Co. or Chas. Clarke or Fred. Brock.

3d X Int. he answers:

No one besides myself had charge of the records or received the messages of the telegraph office at Velasco. Joe Turk acted as messenger and delivered cablegram referred to. I delivered some of them.

4. *To both:* Do you or either of you know anything of the circumstances under which the S. S. *Elfrida* went ashore or was stranded,

and the arrangement by which she was gotten off, and the danger, if any, to which she was exposed while stranded or beached? If so, please state all the facts that you may know.

To 4th X Int. he answers:

233 I do not know any of the circumstances under which the steamship *Elfrida* went ashore or was stranded, nor I do not know the arrangement by which she was gotten off, or any of the facts connected with her while stranded or beached.

5. Is it not a fact that said steamer was in a perilous position, and that if the weather had been severe, or a storm had arisen, that she would probably have been a total loss? And was it not due to the efforts of Chas. Clarke & Co. that she was rescued from the danger to which she was exposed? And is it not a fact that stormy or rough weather came on just after she had been afloat, and that if she had remained aground she would have been wrecked.

5th X he answers:

I do not know whether or not S. S. *Elfrida* was in a perilous position. I do not know what her danger of loss was. I know that it was through the efforts of Chas. Clarke & Co. that the S. S. *Elfrida* was floated. I don't remember whether there was any stormy weather just after she was floated, and don't know whether she would have been wrecked had she remained aground.

6. Did not the pilots and others acquainted with the dangers of the coast, and not interested in the salvage contract, strongly advise the master of the *Elfrida* to enter into a contract which he made with Chas. Clarke & Co. for pulling the vessel off? If so, state all the particulars that you may know in regard to the matter?

6th X he answers:

I do not know that the pilots and others not interested made any advice to captain of *Elfrida;* in fact, I know nothing about anything pertaining to the floating of the steamship except as telegraph operator for the Velasco Terminal Ry. Telegraph Company.

ARTHUR H. VAUGHAN.

Sworn and subscribed to before me this the 14th day of March, 1895.

FRANK E. JONES,

[SEAL.] *Justice of the Peace, ex Officio Notary Public, Brazoria County, Texas.*

234 No. 1. 10, 12.

(Copy.)

Dated New Castle, Tyne.

To Burgess, stmr. *Elfrida*, Velasco:

Accept tender forty-five eighty, if lower impossible. No cure no pay. Try include in agreement if steamer after coming off not worth amount salvage, steamer in damaged state to be taken in payment salvage.

PYMAN.

No. 2. 10, 12, 1894.

(Copy.)

To J. Moller & Co., Galveston:

Pyman cables accept Clarke's bid, tell him better get here quickly. Answer.

M. P. MORRISSEY.

(Copy.)

10, 11, 1894.

To Pyman, New Castle, Tyne:

Delay will cause danger of sand banking, also increasing cost of floating.

(Copy.)

10, 11, 1894.

To Pyman, New Castle, Tyne:

Fresh breeze blowing—rough sea. Vessel laying easy—no water—afraid of sand banking up.

(Copy.)

(3.) 10, 11, 1894.

To J. Moller & Co., Galveston:

White Jacket sailed last night. *Seminole* at Sabine. *Elfrida* running anchors herself. Owners cable await further instructions before engaging assistance. Vessel apparently uninjured.

J. H. LANGBEHN.

235 (4.) (Copy.)

10, 14, 1894.

To Moller, Galv.:

If Clarke cannot come here today, agree with some other tug same price; too much time already lost.

B. BURGESS.

(5.) (Copy.)

Dated Galveston, Tex., 13th.

To Capt. B. Burgess, stmr. *Elfrida*, Velasco:

Clarke with his tug and appliances proceed this afternoon.

J. MOLLER & CO.

(6.) (Copy.)

10, 13.

Dated Galveston, Texas, 13th.

To Capt. B. Burgess, stmr. *Elfrida*, Velasco:

Unfortunately, no other tugs here to be had, Clarke making all possible progress to get his tug, hawsers and anchors and material ready. Expect him ready soon. Will wire again later.

J. MOLLER & CO.

No. 7. (Copy.)

Dated Galveston, Texas, 12th.

To Capt. B. Burgess, S. S. *Elfrida*, Velasco:

Contract price agreed upon will get things ready to start.

CHAS. CLARKE & CO.

No. 8. (Copy.)

10, 12.

To Sorley, Lloyd's agt., Galv.:

Have received cable accept tender forty-five eighty. Please instruct Clark, if steamer not worth salvage salvors to take vessel in lieu of salvage.

BURGESS.

236 (Copy.)

VELASCO, 15, 1894.

To Pyman, New Castle, Tyne:

Have accepted tender forty-five eighty, with right to abandon, lower impossible. Commence work today.

Stipulation.

Filed November 26, 1895.

United States District Court, Eastern District of Texas.

CHAS. CLARKE and ROBERT P. CLARKE, Composing the Firm of Chas. Clarke & Co., Libelants,
vs.
THE S. S. "ELFRIDA;" PYMAN, BELL & Co., Claimants.
} A. D., 672. Appeal.

In the above entitled and numbered cause it was agreed by and between the respective parties that the interrogatories addressed to Artie Vaughan in his second deposition may be omitted, except interrogatories direct and cross and answers including or referred to other subjects than the telegrams merely, and that his evidence will be copied in the transcript by the clerk so as to read as follows, to wit:

"Pursuant to subpœna served on me in the above entitled and numbered cause, I produce the following copies of telegrams, numbered from one to sixty-five, which compose the entire tele-
237 graphic correspondence between the parties mentioned in the telegrams between the date of the first and last messages."

The clerk will please insert in their chronological order, numbering them as inserted, the telegrams attached to the said Artie Vaughan's second deposition.

It is further stipulated by and between the said parties that all the irrelevant parts of the cables and telegrams annexed to the deposition of the witnesses in said cause shall be left out of the record,

meaning by the "irrelevant parts" the printed parts of the telegrams and cables and the conditions on the back.

CONVERS & KIRLIN,
WM. B. LOCKHART,
For Respondents.
JAS. B. & CHAS. J. STUBBS,
JOS. H. WILSON, *For Libelants.*

(Endorsements:) A. D., No. 672. Chas. Clarke & Co., libelants, *vs.* S. S. *Elfrida*, etc. Stipulation. Filed Nov. 26th, 1895. C. Dart, clerk.

Pursuant to subpœna served on me in the above entitled and numbered cause, I produce the following copies of telegrams, numbered from one to sixty-five, which compose the entire telegraphic correspondence between the parties mentioned in the telegrams between the date of the first and last messages:

EXHIBIT 1.

VELASCO, 10/6/94, J. Moller & Co., Galveston: *Elfrida* reported aground mouth of river. Am going down investigate. Will wire later.

M. P. MORRISSEY.

EXHIBIT 2.

VELASCO, 10/6, J. Moller & Co., Galveston: *Elfrida* on west jetty. Prospect of warping off tomorrow when sea moderates.

M. P. MORRISSEY.

238 EXHIBIT 3.

GALVESTON, 10/6, '94, M. P. Morrissey, Velasco: Use wires freely *Elfrida*. Do you need tugboat assistance. Survey must be held, and diver examine vessel's bottom before accepting notice readiness to load.

J. MOLLER & CO.

EXHIBIT 4.

GALVESTON, 10/7, M. P. Morrissey, Velasco: Use wires freely regarding *Elfrida*. What is her position.

J. MOLLER & CO.

EXHIBIT 5.

GALVESTON, 10/8, Captain Burgess, steamship *Elfrida*, Velasco: Will come down tomorrow. Meantime run anchors to keep afloat.

JAMES SORLEY,
Lloyd's Agent.

EXHIBIT 6.

GALVESTON, 10/7, M. P. Morrissey, Velasco: Is ship making water. Will send assistance soon as possible.

J. MOLLER & CO.

EXHIBIT 7.

GALVESTON, 10/8, M. P. Morrissey, Velasco: Lloyd's agent sick; cannot come. Is Clarke working; is ship tight. Suppose she is high and beached. How much water round her. Will *Jacket* finish today.

J. MOLLER & CO.

EXHIBIT 8.

GALVESTON, 10/8, M. P. Morrissey, Velasco: Inform Brock privately as master *Elfrida* called for assistance, we could not help sending Clarke, who had only tugboat available. We have no objection to Brock continuing assisting *Elfrida*, making his own bargain, so long as *White Jacket* attended to. *Lizzie* arrived here; will be with you tomorrow.

J. MOLLER & CO.

239 EXHIBIT 9.

GALVESTON, 10/7, M. P. Morrissey, Velasco: Replying Lloyd's attend tomorrow. Bureau advises tropical hurricane off Port Eads, moving northwest. Recommend using every available means protecting *Elfrida* quickly.

J. MOLLER & CO.

EXHIBIT 10.

GALVESTON, 10/7, M. P. Morrissey, Velasco: Clarke's tug, with hawser, gone *Elfrida's* assistance. Recommend Chas. Clarke, solely, attend matter, he being very practical wrecker.

J. MOLLER & CO.

EXHIBIT 11.

GALVESTON, 10/8, Chas. Clarke, Velasco: When will *Seminole* return. Davenport wants to go. Shall I let *Carbpnero* tow her over. Answer.

CHAS. CLARKE, JR.

EXHIBIT 12.

GALVESTON, 10/8, Fred. A. Brock, Velasco: James Sorley is Lloyd's agent. I am agent national board, but they have not instructed in *Elfrida* case.

W. F. BEERS & CO.

EXHIBIT 13.

Telegram No. 4, VELASCO, 10/7, J. Moller & Co., Galveston: *Elfrida* beached. Immediate assistance imperative, fear drifting higher up. Will stand by wires all day.

MORRISSEY.

EXHIBIT 14.

Telegram No. 8, 11.55 a. m., VELASCO, 10/7, J. Moller & Co., Galveston: Ship not making water. Think not injured, laying head on—straight and firm—sea moderating and prospects good. With tug and anchors at work she will come off when ballast-pumped. Not drifting any.

M. P. MORRISSEY.

240

EXHIBIT 15.

VELASCO, 10/7, 4.56 p. m., J. Moller & Co., Galveston: Think *Elfrida* will accept Clarke. Will Lloyd's agent come. Captain anxious for him.

M. P. MORRISSEY.

EXHIBIT 16.

VELASCO, 10/8, 10 a. m., J. Moller & Co., Galveston: Clarke not begun as sea too rough. Ship apparently tight in 9 feet water. Not beached high. Have Lloyd's wire captain proceed. Cannot finish *Jacket* till Wednesday.

M. P. MORRISSEY.

EXHIBIT 17.

VELASCO, 10/8, 10.05 a. m., J. Moller & Co., Galveston: Captain will not make bargain float ship unless instructed by Lloyd's. Hurry it up.

M. P. MORRISSEY.

EXHIBIT 18.

VELASCO, 10/8, 10.05 a. m., J. Moller & Co., Galveston: I have been on ground and rendered assistance to *Elfrida*, running anchors, etc. Why shut me out altogether? Am able to furnish plant.

BROCK.

EXHIBIT 19.

VELASCO, 10/8, 10.6 a. m., W. F. Beers & Co., Galveston: If you are Lloyd's agent why not let me work on *Elfrida* as well as any other person? I was on ground and ran anchors out before *Seminole* came.

FRED. A. BROCK.

EXHIBIT 20.

VELASCO, 10/8, 3.40 p. m., James Sorley, Esq., Galveston: I have already rendered assistance to steamship *Elfrida*. Before you close with others give me a chance. References, W. F. Beers & Co. and J. Moller & Co. I am doing their work here. Have ample plant.

FRED. A. BROCK.

241 EXHIBIT 21.

VELASCO, 10/8, 9.15 a. m., British consul, Galveston: Please inform me whether Lloyd's agent has left for Velasco *re Elfrida.* If not request him to do so, as I do not care to make any arrangements until his arrival.

BURGESS, *Master.*

EXHIBIT 22.

VELASCO, 10/7, 9.30 a. m., J. Moller & Co., Galveston: *Elfrida* drifted across jetty and now beached. Advise Lloyd's wire and assistance will be sent.

BURGESS.

EXHIBIT 23.

VELASCO, 10/9, 12.10 a. m., J. Moller & Co., Galveston: Think *Elfrida* can get off in about four tides after work begun. Swinging freely on high tides; showing no bed. Will wire this evening.

M. P. MORRISSEY.

EXHIBIT 24.

VELASCO, 10/9, 3.45 p. m., Chas. Clarke, Jr., Galveston: *Seminole* will be in Galveston tonight.

CHAS. CLARKE.

EXHIBIT 25.

VELASCO, 10/9, 7.30 p. m., Pyman, Newcastle, Tyne: Lloyd's agent here. Certain put ship Galveston, including divers; lowest bid, £4,580. Lloyd's and myself recommend acceptance. Vessel easy, bottom sand, 1,000 feet from deep water.

—— ——.

EXHIBIT 26.

GALVESTON, 10/9, received 8.35 a. m., M. P. Morrissey: Langbehn goes morning. Try have everything ready. He wishes return tomorrow evening, Clarke's tug. Inform Clarke.

J. MOLLER & CO.

242 EXHIBIT 27.

NEW CASTLE, TYNE, 10/9, received 3 p. m., Burgess, steamer *Elfrida,* Velasco: Don't act without our instructions, Lloyd's underwriters communicating direct, as consider tender excessive. Try get condition in tender giving us right abandoning vessel to salvors in lieu of salvage charges.

—— ——.

EXHIBIT 28.

VELASCO, 10/9, 7.20 p. m., Lloyd's, London: *Elfrida* lies easy 1,000 feet from deep water. Master and I have two proposals to float ship and place in Galveston. No success, no pay. Lowest bid, £4,580. Recommend acceptance. Waiting answer here.

SORLEY.

EXHIBIT 29.

VELASCO, 10/15, Chas. Clarke, Jr., Galveston: Bring yawl-boat from Lynchburg with anchor. Charter small schooner to bring anchor over. Hurry.

CHAS. CLARKE.

EXHIBIT 30.

Chas. Clarke, Velasco, from Galveston, 10/15, received at Velasco at 1.45 p. m.: Anderson here. Robert not over. Shall I send *Seminole* down? Anchor here from Lynchburg. Answer.

CHAS. CLARKE, JR.

EXHIBIT 31.

VELASCO, 10/18, 9.25 a. m., Chas. Clarke & Co., Galveston: Ship afloat. Now alongside Quintana wharf.

CHAS. CLARKE.

EXHIBIT 32.

GALVESTON, 10/18, Chas. Clarke, Velasco: Watson with diving apparatus will come tomorrow. Fred can't come. If you need me wire.

R. P. CLARKE.

243 EXHIBIT 33.

VELASCO, 10/18, J. Moller & Co. (sent 11.10 a. m.), Galveston: Master may have survey here, and without owners' instructions.

M. P. MORRISSEY.

EXHIBIT 34.

VELASCO, 10/18, 11.20 a. m., Clarke & Chase, Galveston: Come to Velasco tomorrow with diving apparatus. See Sorley before starting.

CHAS. CLARKE.

EXHIBIT 35.

VELASCO, 10/18. Pyman, Newcastle: Dolorous diversely dyspeptic Expect tomorrow license declarable Redtail Norfolk impossible save charter Moller refuse except until dry-docked.

——.

EXHIBIT 36.

VELASCO, 10/18, 11.05 a. m., Pyman, Newcastle, Tyne: Moller advises underwriters refuse insure unless dry-docked. Nearest dock Norfolk. Instruct settlement salvage, also docking.

——.

EXHIBIT 37.

VELASCO, Pyman, Newcastle: *Elfrida* floated. Will survey.

——.

EXHIBIT 38.

NEW CASTLE, TYNE (received at 2.15 p. m., 10/18, '95), steamer *Elfrida*, Velasco: When, where survey is finished relishing and raft bridge by Lloyd's. Can you save cancelling date? Roasted which is nearest.

PYMAN.

244 EXHIBIT 39.

GALVESTON, 10/18 (received at 10.32 a. m.), M. P. Morrissey, Velasco: Underwriters have given notice will not insure *Elfrida* until dry-docked and bottom properly examined. Diver's survey not sufficient to make vessel seaworthy. Nearest dry dock, Norfolk, Va. What is master going to do?

J. MOLLER & CO.

EXHIBIT 40.

VELASCO, 10/18, J. Moller & Co., Galveston: *Elfrida* moored Quintana. If survey held what will you do about loading.

M. P. MORRISSEY.

EXHIBIT 41.

VELASCO, 10/18, Sorley, Lloyd's agent, Galveston: Vessel surveyed by captain and engineer steamship *Lizzie*. Will you accept same for Lloyd's. Reply my expense.

BURGESS.

EXHIBIT 42.

GALVESTON, 10/29, Captain B. Burgess, steamer *Elfrida*, Velasco: Congratulations. Send me diver's report; also general conditions of ship. When will you have survey?

SORLEY,
Lloyd's Agent.

EXHIBIT 43.

GALVESTON, 10/19 (received at 5.40 p. m.), Captain B. Burgess, Velasco: Yes.

JAS. SORLEY.

EXHIBIT 44.

VELASCO, 10/20, Chas. Clarke & Co., Galveston: All finished. Will be home on train tonight.

CHAS. CLARKE.

245 EXHIBIT 45.

GALVESTON, 10/22, (received at 2.45 p. m.), Fred A. Brock, Jr., Velasco: Let Ingalls bring *Elfrida* to wharf. She loads at Velasco 100 bales marked elbow. Must go on *Lizzie* screw cotton. If Captain Burgess and I come tomorrow, send captain telegram immediately.

FRED A. BROCK.

EXHIBIT 46.

GALVESTON, 10/22, Scott, care *Elfrida*, c. o. Brock, Jr., Velasco: Take ship up to Velasco and moor alongside wharf at once. Will arrive Velasco tomorrow.

BURGESS.

EXHIBIT 47.

VELASCO, 10/23, Pyman, Newcastle, Tyne, Charles Clarke, R. P. Clarke, Galveston, contractors, wreckers, notary form, will not release until money deposited.

BURGESS.

EXHIBIT 48.

VELASCO, 10/23, Pyman, West Hartlepool: Allegro.

EXHIBIT 49.

GALVESTON, TEXAS, 10/23, steamer *Elfrida*, Velasco: Repeat joint names describing who they are money ready, but underwriters wish know if salvage contract is on their form, and pending receipt contract wish money deposited. Joint names ourselves and salvors. Newcastle Tyne.

EXHIBIT 50.

VELASCO, 10/24, Clarke & Co, Galveston: Contract with Nelson $25. Seize steamship *Elfrida*. Will be home tonight. Have papers ready and *Josephine* to bring marshal.

CHAS. CLARKE.

246 EXHIBIT 51.

VELASCO, 10/24, J. Moller & Co., Galveston: Have Wilson get papers ready seize *Elfrida*. I will be in Galveston tonight.

CHAS. CLARKE.

EXHIBIT 52.

VELASCO, 10/24, Chas. Clarke & Co., Galveston: Captain comes to Galveston train tomorrow. Get papers seize ship.

FRED. A. BROCK.

EXHIBIT 53.

VELASCO, 10/24, Pyman, Newcastle, Tyne: Ship arrested. Must sign release Galveston. Wire instructions.

EXHIBIT 54.

VELASCO, 10/24, 4.45 p. *e.*, J. Moller & Co., Galveston: Don't like let tug go account finishing *Lizzie*. Will send captain tomorrow's train.

MORRISSEY.

EXHIBIT 55.

GALVESTON, 10/24, (received at 8 p. m.), M. P. Morrissey, Velasco: Two telegrams here for *Elfrida*. Shall we open same and telegraph contents?

J. MOLLER & CO.

EXHIBIT 56.

GALVESTON, 10/24, M. P. Morrissey, Velasco: Captain Burgess must come here to sign release papers United States court. Recommend proceeding Brock's tug tonight. Answer.

J. MOLLER & CO.

EXHIBIT 57.

GALVESTON, 10/23, (received 10/24, at 8.25 a. m.), M. P. Morrissey, Velasco: Have no reply *Elfrida* owners. Therefore do not let her sail until we advise.

J. MOLLER & CO.

247 EXHIBIT 58.

VELASCO, 10/25, Chas. Clarke & Co., Galveston: Ship seized.

FRED BROCK.

EXHIBIT 59.

VELASCO, 10/25, J. Moller & Co., Galveston: Repeat *Elfrida's* cables here.

M. P. MORRISSEY.

EXHIBIT 60.

GALVESTON, 10/25, M. P. Morrissey, Velasco: Clarke's tug proceeded this morning with telegrams, and will bring Captain Burgess here this afternoon, as he must be here to release his ship. Marshal will be on board this afternoon.

J. MOLLER & CO.

EXHIBIT 61.

GALVESTON, 10/25, M. P. Morrissey, Velasco: Clarke's tug did not go. Marshal has Captain Burgess' telegrams. Tell Burgess come here today's train, bringing papers so we can disburse and finish vessel's accounts here.

J. MOLLER & CO.

EXHIBIT 62.

10/12, NEW CASTLE, TYNE, Burgess, steamer *Elfrida*, Velasco: Accept tender forty-five eighty if lower impossible. No cure no pay. Try include in agreement if steamer after coming off not worth amount salvage, steamer in damaged state to be taken in payment salvage.

PYMAN.

EXHIBIT 63.

VELASCO, 10/12, J. Moller & Co., Galveston: Pyman cables accept Clarke's bid. Tell him better get here quickly. Answer.

M. P. MORRISSEY.

248 EXHIBIT 64.

VELASCO, 10/11, Pyman, New Castle, Tyne: Delay will cause danger of sand banking; also increasing cost of floating.

——— ———.

EXHIBIT 65.

VELASCO, 10/11, Pyman, New Castle: Fresh breeze blowing—rough sea, vessel laying easy—no water—afraid of sand banking up.

——— ———.

EXHIBIT 66.

VELASCO, 10/11, J. Moller & Co., Galveston: *White Jacket* sailed last night. *Seminole* at Sabine. *Elfrida* running anchors herself. Owners cable await further instructions before engaging assistance. Vessel apparently uninjured.

J. H. LANGBEHN.

EXHIBIT 67.

VELASCO, 10/14, Moller, Galveston: If Clarke cannot come here today, agree with some other tug same price. Too much time already lost.

B. BURGESS.

EXHIBIT 68.

GALVESTON, 10/13 (received at 12.05 p. m.), Capt. B. Burgess, Velasco: Clarke with his tug and appliances proceed this afternoon.

J. MOLLER & CO.

EXHIBIT 69.

GALVESTON, 10/13, Capt. B. Burgess, Velasco: Unfortunately no other tugs here to be had. Clark making all possible progress to get his tug, hawsers and anchors and material ready. Expect him ready soon. Will wire again.

J. MOLLER & CO.

249 EXHIBIT 70.

GALVESTON, 10/12, Sorley, Lloyd's agent, Galveston: Have received cable accept tender forty-five eight-. Please instruct Clark if steamer not worth salvage, salvors to take vessel in lieu of salvage.

BURGESS.

EXHIBIT 71.

VELASCO, 10/15, Pyman, Newcastle, Tyne: Have accepted tender forty-five eighty with right to abandon. Lower impossible; commence work today.

EXHIBIT 72.

GALVESTON, 10/12, Capt. B. Burgess, Velasco: Contract price agreed upon; will get things ready to start.

CHAS. CLARKE & CO.

EXHIBIT 73.

VELASCO, 10/8/94—time sent, 9.30—Pyman, New Castle: Vessel same position. Lloyd's agent not arrived.

EXHIBIT 74.

VELASCO, 10/7/94, Pyman, New Castle, Tyne: Sinecure Friday; scandal signally synoptic artillery.

EXHIBIT 75.

Received at 1.47 p.; dated New Castle, Tyne, 8th; steamer *Elfrida*, Velasco: Gladdening speaker surgeon sexton governing.

250 EXHIBIT 76.

Time received, 11.15 a. m.; dated New York, N. Y., 25th; capt. steamship *Elfrida*, Velasco: We represent steamer in salvage matter please consult W. O. Lockhart solicitor, Galveston, our agent, report to us fully circumstances of signing salvage agreement also extent of service, telegraph main facts briefly.

CONVERSE & KIRLIN,
Temple Court, New York City.

EXHIBIT 77.

Time sent, 2.35 p.; VELASCO, 10/26/94, J. Moller & Co., Galveston: Brock's bill one hundred dollars provision bill forty dollars fifteen cents pilotage thirty-nine.

M. P. MORRISSEY.

EXHIBIT 78.

Time sent, 11.50 a.; VELASCO, 10/26/94, J. Moller & Co., Galveston: You instructed Burgess go Galveston yesterday. He is there.

M. P. MORRISSEY.

EXHIBIT 79.

Time received, 2.20 p. m.; dated Galveston, Texas, 26th; Fred Brock, Jr., Velasco: Release ship *Elfrida* bond given.

WM. P. OWENS,
Deputy Marshal.

EXHIBIT 80.

Time rec'd, 1.52 p.; dated Galveston, Tex., 26th; M. P. Morrissey, Velasco: Send amount Brock bill running anchor, provision bill, pilotage out.

J. MOLLER & CO.

251 EXHIBIT 81.

Time sent, 8.20 a.; VELASCO, 10/26/94, J. Moller & Co., Galveston: Include customs dues entry and clearance fees *Elfrida.*

M. P. MORRISSEY.

EXHIBIT 82.

Time rec'd, 11.40 a.; dated Galveston, Texas, 26th; M. P. Morrissey, Velasco: Langbehn due yours by tug noon have *Elfrida* master and papers all ready as Langbehn leaves tonight again.

J. MOLLER & CO.

EXHIBIT 83.

Time rec'd, 1.55 p.; dated Galveston, Texas, 27th; M. P. Morrissey, Velasco: Please arrange with customs to have vessel cleared early tomorrow morning.

BURGESS.

EXHIBIT 84.

Time rec'd, 8.15 a. m., 10/27; dated Galveston, Texas, 26th; Mr. Scott, S. S. *Elfrida,* Velasco: Order steam for Saturday, 2 p. m. Will be over.

B. BURGESS.

EXHIBIT 85.

Time rec'd, 1.55 p., 10/27; Scott, S. S. *Elfrida*, Velasco: Have steam for morning. Will arrive Velasco tonight.

BURGESS.

EXHIBIT 86.

Time sent, 7.45 p.; VELASCO, 10/29/94; Pyman, New Castle, Tyne: Searching.

—— ——.

252 Hearing before W. L. Hanscom, Esq., U. S. com'r, at Galveston, Texas, Saturday, December 8, 1894.

Captain BURGESS, a witness on behalf of the respondent, being duly sworn, testified as follows:

Direct examination by Mr. PAINTER, proctor for respondent:

Q. What is your name?
A. Benjamin Burgess.
Q. What is your occupation?
A. Master.

By Mr. STUBBS, proctor for libelant: The libelant objects to this witness being again examined, as we are informed that his testimony has been twice already taken in this case, and there has been no predicate laid, by way of pleadings or otherwise, to show that any newly discovered or further testimony can be elicited from the same witness; nor has any reason or excuse been given for not having obtained all the testimony and all the information that this witness had on two former examinations before commissioners.

We further object to the witness being examined, because it is not an orderly procedure to recall and re-examine a witness in the absence of a showing of such inadvertence, omissions, or of additional facts that he is able to impart and could not heretofore depose to, and in the absence of any showing that claimant and the witness have exercised usual care and diligence to produce this testimony on the former examinations.

Examination by Mr. PAINTER:

Q. Master of what?
A. The steamship *Elfrida*.
Q. How long have you been occupying that position?
A. Since September, of this steamer.
Q. Since September of what year?
A. This year.
Q. What steamers have you been master of, and for what periods before this?
A. None.
Q. Is this your first attempt as master of a vessel?
A. Yes, sir.

253 Q. What is your age?
A. Twenty-eight.
Q. How long have you been in the occupation of a seaman?
A. Thirteen and one-half years.
Q. Do you know of the steamship *Elfrida's* stranding at any time recently?
A. Yes, sir.
Q. Where was it?
A. At the mouth of the Brazos river.
Q. When? About when?
A. About the 5th of October (refers to paper).
Q. Did the steamship *Elfrida* remain stranded there, and if not and she sailed from there, state where she sailed to?
A. Newport News.
Q. Under what orders did you sail to Newport News in regard to the steamship?
A. The dry dock.
Q. Had you any other orders to proceed after she should dry-dock, at the time she arrived at Newport News?
A. No.
Q. Do you know of any depositions or any evidence being taken of yourself or any of the crew or seamen upon the steamship *Elfrida* at Newport News?
A. The depositions were taken at Norfolk.
Q. You say you do?
A. Testimony was taken at Norfolk.
Q. Whose depositions and evidence was taken at Norfolk? Give the names, if you remember.
A. The second mate, William Bradley; chief mate, Peter Scott; the carpenter, William or John Brown, I don't remember which now; the chief engineer, John Dove; second mate, William Charlson; John Boylan and myself.
Q. Where were you and these parties you have named—who were the crew of the vessel—at the time the depositions were taken?
A. At Norfolk.
Q. What State and county?
A. Virginia.
Q. How far is Norfolk from Newport News?
A. I don't know exactly how far. Fifteen or sixteen miles. I could not say truthful what it is.
Q. Were there any orders as to the movement or the sailing of the vessel at the time or before the taking of these depositions of these parties you have mentioned?
A. No. Not to where we had to go.
254 Q. When did you learn where you had to go to from Newport News, in reference to the time when the depositions were taken?
A. I received a cable the same day.
Q. After or before?
A. After I got back to Newport News from Norfolk, saying that I should communicate with Mr. Moller, at Galveston, for orders.

Q. What relation or employment had these parties, that you have mentioned as having their depositions taken, to the vessel, and how long should such employment continue?

A. They were the mates and engineer of the vessel, and the carpenter on the vessel.

Q. For how long had they shipped?

A. Until the vessel is back in the United Kingdom.

Q. Did the vessel remain at Newport News, or sail from there?

A. She sailed from there.

Q. When and to where did she sail?

A. I could not give you the dates. She sailed to Galveston from there.

Q. About when, as to the time of the taking of the depositions?

A. The fourth day after that.

Q. How many, if any of the parties, whose names you have given, that gave their testimony, as you have stated, sailed with the steamship *Elfrida* from Newport News?

A. All of them.

Q. State whether or not, any or all of such persons that I have just described are now with the vessel and intend to sail with it on its voyage from Galveston?

A. All of them, to the best of my belief.

Q. Where is the steamship *Elfrida* now?

A. In Galveston roads.

Q. When is she going to sail, if at all?

A. Tomorrow.

Q. Where is she going to sail to?

A. Hamburg.

Q. Who is her master on such sail?

A. Myself.

Q. When did you say the *Elfrida* would sail?

A. Tomorrow.

Q. You are going to sail—ship as her master?

A. Yes.

Q. Captain, at the time of the taking of the depositions of the parties you have described heretofore, state whether or not you knew where the vessel was to sail or what her future orders would be; or did you get your information after or before the depositions were taken?

255 A. I got my orders of the port to proceed to after the depositions had been taken.

Q. Captain, do you know of the *Elfrida's* having any accident or difficulty at Velasco, at the mouth of the Brazos river?

A. Yes.

Q. State what such accident was, if you know.

A. The vessel stranded.

Q. Please state whether you have ever had any experience as master of the vessel in such accident.

A. No. Never before.

Q. State whether or not you had ever been to the port of Velasco before; and, if so, state when and how often.

A. I was never at Velasco before, until that time.

Q. Now, you will please state how the vessel was stranded—as to its position in reference to the surrounding country. Describe its position when you found it stranded, in reference to the banks or the objects that you could see.

A. She was about one thousand feet from deep water, as near as I could tell.

Q. What was her position as to the banks?

A. The banks or the beach?

Q. The beach?

A. She was upon the beach, yes.

Q. Was she head on or broadside on?

A. Head on.

Q. State whether or not you had any personal acquaintance with the bottom at Velasco, where she was stranded.

A. I had no personal acquaintance, that is, not with the nature of the bottom.

Q. Did you know anything about the conditions of that country, of the dangers that surrounded a vessel there as to sand banking around her?

A. I only knew that she was on the beach and that she had to get off.

Q. With whom did you communicate with reference to her condition, where she was stranded?

A. My owners.

Q. Did you communicate with any one else?

A. Lloyd's agent.

Q. Did you communicate with any one else?

A. I wired to Mr. Moller informing him of the circumstances.

Q. To whom did you say?

A. Mr. Moller.

Q. Did you wire to Mr. Moller as an individual or in his connection with the firm.

A. The firm.

Q. Who is Lloyd's agent?

A. Mr. James Sorley.

256 Q. How did you communicate with your owners?

A. By cable.

Q. Whom did you consult with reference to such communication with your owners?

A. How do you mean?

Q. With whom did you consult in reference to your communication with your owners?

A. I took that upon myself to communicate with my owners. It was my duty to do so.

Q. With whom did you consult in Galveston, if at all, about the condition of the *Elfrida?*

A. With Mr. Sorley.

Q. And who else?

A. Nobody else in Galveston.

Q. Have Messrs. J. Moller & Co. any agent, a representative at Velasco?

A. Yes.

Q. Who?

A. Mr. Morrissey.

Q. Did you communicate and have conversation with Mr. Morrissey?

A. Yes.

Q. Frequently or seldom, or how often?

A. Almost daily.

Q. How soon did you meet him after you stranded?

A. On Sunday morning.

Q. What day did you strand?

A. Early Sunday morning.

Q. You saw him Sunday morning, immediately afterwards?

A. Yes.

Q. What relation has J. Moller & Co. to the steamship *Elfrida?* What connection or business?

A. They are agents by charter.

Q. State whether or not you knew that at the time.

A. Of course, according to the charter-party they had to attend to my ship's business.

Q. State what faith and reliance you had, if any, in the agent of J. Moller & Co.?

A. I was instructed to apply to him by a letter from Mr. Moller.

Q. Have you that letter with you?

A. No, I have not.

Q. Where is it?

A. I don't know where it is. On board the ship, I expect.

Q. Did you follow those instructions or not?

A. Of course, I applied to Mr. Morrisy.

Q. Who else, about Velasco or at Velasco, did you consult in reference to the condition the vessel was in?

A. No one there.

257 Q. Did you have any personal conversation with Mr. Sorley?

A. Yes.

Q. When was it such conversation occurred?

A. About the 7th or the 8th; I won't say which. When Mr. Sorley came down to Velasco from Galveston.

Q. How long did he stay?

A. He stayed one day. No, it must have been two days he stayed.

Q. From whom other than Mr. Morrisy as agent of J. Moller & Co. did you get information at Velasco?

A. Mr. Sorley.

Q. Were or not the communications you had with your owners based upon information that you got from Mr. Morrisy and that you could see personally, there?

A. What I communicated to my owners was my own opinions and Mr. Sorley's.

Q. Is it not a fact that the information you gained from Mr. Morrisy aided and assisted you in arriving at the conclusion you did in communicating with your owners?

A. I consulted Mr. Morrisy several times respecting the position and the likelihood of getting assistance from elsewhere, and he informed me that there were only two salvors in Galveston, and that it would cost more to get it from elsewhere, and that the position of the vessel was getting more dangerous every day.

Q. What did Mr. Morrisy say about the condition of the vessel and her future danger?

A. He told me that she was in a very bad position.

Q. Did he tell you anything about there being liability of other danger?

A. I can't say that he did.

Q. Did Mr. Morissy say anything to you about the danger of the sand banking about the vessel where she was stranded?

Proctor for libelant objects to the foregoing question as leading.

A. I can't remember his saying anything about the sand banking around the ship.

—. Did you, at any time, inform your owners of the position the *Elfrida* was stranded, as to being head on or broadside on the bank?

A. Not by cable.

258 Q. Did you inform them of her position as I have just described before you signed the written contract?

A. No.

Q. Did they know of her position, as far as you knew, prior to the time you signed the contract?

A. They knew no more than what they got by my cables.

Q. Is it not a fact, Mr. Burgess, that you had implicit faith and instructions to take counsel with J. Moller & Co.?

A. Yes.

Q. Did you obey and follow their instructions?

A. Yes.

Q. Did they or not have effect upon you in your communication with your owners, or did you disregard them?

A. I did not disregard them altogether. I was guided by what they told me.

Q. By they, who do you mean?

A. Messrs. Moller & Co., the agents.

Q. Do you or not refer to this as having effect upon your communications with your owners? Is that what I understand?

A. The communications with my owners were through when I got instructions from Moller & Co. I received those afterwards.

Q. What is your general instructions and habits in reference to communicating with your agents at the port in case of difficulty? Were they your agents?

A. They were the charterer's agents. They do the ship's business when in port at the time we are here; but, in regard to difficulties or any danger like that, we have to get information else-

where pretty often. We consult with them so long as everything goes all right, and after that we go somewhere else.

Q. You at once proceeded to Morrisy after you got on shore? Why did you proceed to Morrissy's office?

A. I did not proceed there at once; I asked for Mr. Moller's agent at Velasco and I was taken to him.

Q. Do you remember the communications you made with your owners?

A. I can't remember them. There were a lot of code words used.

Q. Do you remember the substance of the communications as to the conditions of the vessel?

A. I don't remember what the telegrams were in regard to the position and condition of the vessel.

Q. Were you fully advised as to the seriousness or ease
259 with which the vessel could be got off of the place where she was then stranded?

A. No.

Q. When you communicated with your owners did you or not give them to understand she was in a worse or better condition than she really was in?

A. The first cable I sent told that the vessel laid easy, and gave the position and distance from deep water. Then afterwards I wired them that there was every probability of a bank forming round the ship, which was my opinion.

Q. When were those communications, in reference to the time of the signing of the written contract? Was it before or after?

A. That was before. I can't remember the dates.

Q. Did you or not communicate with your owners the position of the vessel, relative to the beach, as to whether she was head on or broadside on?

A. Not by cable.

Q. Did you do this before you signed the written contract?

A. I sent them word before I signed the contract, but it was by letter, and they would not receive it so soon.

Q. Mr. Burgess, I hand you now here seven papers which, for the purpose of this question and your answer, will be designated as Exhibits A, B, C, D, E, F and G, and will be attached to this evidence and known as Exhibits A, B, C, D, E, F and G. Please examine them and explain what they are?

A. They are cablegrams that I sent from Velasco.

Q. What is Exhibit A?

A. It is a cable that I sent on arrival at Velasco the first day.

Q. In the body there are code words; please explain what they mean an- interpret them?

A. The first word is sinecure.

Q. What does it mean?

A. Ship grounded at the entrance of the harbor. That is Friday. Scandell, she is fast head and stern. "Signally," the ship is in a critical position. —, have sent for assistance. "Artillery," the ship was in charge of a Government pilot.

Q. By whom was that sent, and to whom was it sent?
A. By myself to Pyman, Bell & Co.
Q. To whom was it went?
A. Pyman, Bell & Co., New Castle.
260 Q. Who are they?
A. My owners.
Q. Owners of the steamship *Elfrida?*
A. Yes, sir.
Q. When was that sent?
A. That was sent on Sunday.
Q. What date?
A. The 7th day of October, 1894.
Q. What is Exhibit B?
A. That is the cablegram I sent.
Q. By whom and to whom?
A. By myself to the owners.
Q. When?
A. On the 8th, so it is stated here.
Q. What are the contents of that cablegram?
A. "Vessel same position; Lloyd's agent not arrived."
Q. What is Exhibit C?
A. That is another cable.
Q. Sent by whom and to whom?
A. By myself to the owners.
Q. What were the contents of the original cable?
A. Lloyd's agent here; "Serpent" means advertise for tenders to get the ship off on the principle of no cure, no pay. Put ship in Galveston, including diver; lowest bid 4,580 pounds. Lloyd's and myself recommend acceptance. Vessel easy, bottom sand 1,000 feet from deep water.
Q. What is Exhibit D?
A. That is another cable.
Q. Sent by whom and to whom?
A. By me.
Q. To whom?
A. To Pyman, Bell & Co.
Q. When?
A. On the 11th.
Q. What were the original contents?
A. "Delay will cause danger of sand banking; also increase cost of floating."
Q. What is the next?
A. Another cable: "Fresh breeze blowing."
Q. What exhibit do you refer to?
A. To Exhibit E—cablegram to Pyman, Bell & Co., Newcastle, from myself.
Q. Dated when?
A. The 11th.
Q. What were the contents of the original cable?
A. "Fresh breeze blowing; vessel lying easy; making no water; afraid of sand banking up."

Q. What is the one before you now?
A. Exhibit F; that is accepting the tender.
Q. What is that tender—sent by whom and to whom?
A. By me to my owners.
Q. When?
A. On the 15th.
261 Q. What were the contents of the original?
A. "Have accepted of 4,580 with right to abandon; lower impossible; commence work today.
Q. What do you mean by 4,580?
A. 4,580 pounds.
Q. Does that cablegram say pounds?
A. No, sir; it does not say pounds.
Q. That was what was meant?
A. Yes, sir.
Q. What is Exhibit G?
A. That is a cable.
Q. Sent by whom and to whom?
A. Sent by me to Pynam, Bell & Co.
Q. When?
A. On the 18th.
Q. What were the contents of the original?
A. "*Elfrida* afloat; will survey."
Q. Now, where are the originals of those that you wrote?
A. In the telegraph office at Velasco.
Q. Where did you get those papers?
A. They were sent from Velasco.
Q. By whom were they sent from Velasco; that is, from whom did you get them?
A. From our agents there.
Q. Do you recognize those papers as containing the contents of the cablegrams that you sent?
A. Yes, sir.
Q. And as being correct copies?
A. Yes, sir.

Mr. PAINTER: We offer them as exhibits to be attached.

Q. Where were you when you sent these cablegrams that you have just testified about?
A. Velasco.
Q. In whose office, or where were you?
A. In Mr. Morrissey's office.
Q. Who delivered those cablegrams to the telegraph office?
A. He did.
Q. Who did?
A. Mr. Morrissey.
Q. Did he write them, or did you write them and give them to him?
A. I wrote them out and gave them to him.
Q. Do you know whether he kept a copy of those or not?
A. I don't know that, sir.

Q. Did you receive any cablegrams from your owners, or from any correspondent in Galveston, Texas?

A. Yes, sir.

Q. During the period while the vessel was stranded?

A. Yes, sir.

262 Q. Who received any such cablegrams?

A. They were directed in care of Messrs. Moller & Co., of their agents there.

Q. Who received them, or any of them?

A. How do you mean?

Q. Who received them from the telegraph office?

A. Mr. Morrissey generally.

Q. Then what did he do with them?

A. Handed them over to me.

Q. I now hand you the Exhibits C, D and E, that you have testified about heretofore just now. You will please state who received these cablegrams or telegrams from the telegraph office?

A. They were sent by me.

Q. Well, now, who received the telegrams or cablegrams in answer to Exhibits C, D and E? And especially the one reading as follows: "Accept tender 4,580 pounds if lower impossible. No cure, no pay. Try include in agreement if steamer after coming off not worth amount of salvage, steamer in damaged state, to be taken in payment of salvage."

Mr. STUBBS: Mr. Commissioner, we reserve our objection on the ground that the original telegram is not produced, and its non-production is not accounted for.

A. I received them through Mr. Morrissey; he received them first and then delivered them to me.

Q. Captain, can you give the dates when those three telegrams were received by you?

A. Which three?

Q. The answers to those three telegrams at that time?

A. I could not give you the dates; the dates will be on the originals.

Q. Captain Burgess, will you please state whether you have in your possession the original telegrams or cablegrams in answer to Exhibits C, D and E attached to this deposition, or state where they are if you have them not?

A. I haven't them.

Q. Do you know where they are?

A. Mr. Kerlin has them.

Q. Did you see them at the time of your deposition in Hampton roads?

A. Yes, sir.

Q. What became of them there?

A. They took care of them; I didn't have anything to do with them.

263 Q. Did you testify about them there?

A. Yes, sir; I testified that they were the cablegrams that I received.

Q. Do you know whether they were attached to our deposition that was taken there?

A. Yes, sir; I believe they were.

Q. Captain Burgess, did you receive a cablegram from your owners reading as follows: "Accept tender 4,580 pounds if lower impossible. No cure, no pay. Try and include in agreement if steamer after coming off not worth amount of salvage, steamer in damaged state to be taken in payment of salvage." Did you receive such a cablegram?

A. Yes, sir.

Mr. STUBBS: Same objection, please, to that, as heretofore made, as it is not the best evidence.

Q. What date did you receive this?

A. I cannot give you the date.

Q. At whose office did you receive it?

A. It was received on the wharf.

Q. What did Mr. Morrissey say to you when you received this cablegram from him?

A. He said that he had wired Charles Clarke & Co. at Galveston.

Q. What did he say he had wired Charles Clarke & Co. at Galveston?

A. That the owners had agreed to accept his 4,580.

Q. Did he tell you that he had wired Charles Clarke & Co. before you had informed him of the contents of the cablegram he handed you?

Mr. STUBBS: We reserve an objection for the reason that it is hearsay, and that it is not relevant or admissible in the absence of proof showing that Mr. Morrissey was acting for the libelant in this case; or in the absence of evidence that Mr. Morrissey communicated, or caused to be communicated these cablegrams or their contents to the libelants in this case; otherwise it is *res alios inter acta.*

Q. Captain, who received the last telegram I just quoted from the telegraph office, or who handed it to you?

A. Mr. Morrissey handed it to me; I was down at the ship at the time when he arrived on the beach.

264 Q. And where did you meet him?

A. Upon the wharf at Velasco; after I came up from Quintana.

Q. Did he report having taken any action upon this cablegram, Captain?

Mr. STUBBS: The same objection as heretofore made is renewed to this and other questions regarding conversations or transactions with Mr. Morrissey for the reasons heretofore stated, and the objection is a continuing one to all that class of questions, the libelants not being shown thus far to have been acting in concert with Mr. Morrissey, nor he authorized to act or speak for them.

Q. What action or thing, if any, did Mr. Morrissey say he had taken upon this cablegram for you?

A. He said that he had wired to Mr. Clark at Galveston.

Q. At the time he said this had you or not informed him of the contents of this cablegram?

A. I showed him the cablegram when I opened it.

Q. At the time that he informed you that he had wired Clark & Co. at Galveston had you then, at that particular moment, informed him or shown him the cablegram you had received?

A. No, sir.

Q. State what communication, if any, you made to Chas. Clark & Co. individually after receiving this cablegram as above quoted?

A. I did not send any telegram to Mr. Clark.

Q. State whether you received any communication or telegram from Messrs. Clark & Co.

A. Yes, sir; I received one telegram.

Q. Have you that telegram in your possession?

A. No, sir.

Q. Where is it?

A. Mr. Kirlin has it.

Q. Did you have it at the taking of your evidence at Newport?

A. Yes, sir.

Q. Is it attached to your deposition?

A. I believe it is.

Q. What were the contents of it?

A. "Accept tender"——

Q. I mean the contents of the telegram from Clark to you after he had received——

A. I don't remember the exact words. It was to the effect
265 that he had accepted the tender and he would come down with his tug and his gear.

Q. When did you receive this communication from Clark & Co.?

A. In the afternoon.

Q. Of what day?

A. I cannot tell you what day; the day that I received the telegram.

Q. From your owners?

A. Yes, sir.

Q. Had you any communication with any other than Mr. Morrissey about the contents of the cablegram that you had received from your owners?

A. Yes, sir; I let Capt. Durker, of the *Lizzie*, see it.

Q. Where was he?

A. He was there with Mr. Morrissy at the time.

Q. You let him see it at the time you showed it to Mr. Morrissey?

A. Yes, sir.

Q. Is that the time that you testified heretofore that you showed the cablegram to Mr. Morrissey?

A. Yes, sir.

Q. The same time?

A. Yes, sir.

Q. Is not this about the substance of the telegram received from

Charles Clark & Co. that day: "Contract price agreed upon; will get things ready to start"?

Objection because the telegram is not produced or accounted for, and because the question is leading, and the witness has already stated the substance of the telegram received by him from Clark & Co.

A. That is the telegram that I received.

Q. Was the cablegram, as you received it from your owners, sealed when you received it?

A. Yes, sir.

Q. Did Clark & Co., or any one repre-enting them, come to see you after you received this telegram from them; if so, when?

A. Yes, sir; they came down.

Q. When?

A. The day after.

Q. What conversation did you have with Clark & Co., or any one representing them, about the price of the work that they were then proposing to do to float the vessel?

A. I asked them if they would accept less.

Q. What did they say?

A. They told me that if the agreement was not settled they would have to give it up—if we did not come to terms, they would have to give it up.

Q. What terms?

A. This $22,000.

266 Q. Did he give you any reasons or state why he had to give it up?

A. He said that a bank might form around the ship and it would cost more to float her—the risk would be greater.

Q. Who told you this?

A. Mr. Clark.

Q. Did you endeavor to solicit other people after receiving this cablegram that I quoted above?

A. I saw Mr. Brock; that was the other party that attended.

Q. What did he say about doing the work for a lesser price than $22,000?

A. He would not do it.

Q. What did he say?

A. He said he could not do it for less.

Q. What was his bid?

A. $24,000.

Q. Did you make any other effort to get any one to do the work after receiving that telegram?

A. I wired to Mr. Muller to say that if Mr. Clark was not ready to come down that he would have to send down some one else, and he wired down that Mr. Clark was ready to come.

Q. In Exhibit D you say, "Delay will cause danger of sand banking, also increase the cost of floating," and in Exhibit E you say, "Fresh breeze blowing; afraid of sand banking." Upon what in-

formation or from what source did you come to that conclusion, captain?

A. For sending those cables?

Q. For sending those D and E cables.

A. Well, I sent this cable (Exhibit D) when Mr. Clark said that if I did not receive word soon he would want more for floating the ship as there was a bank forming around her, and I cabled my owners to that effect.

Q. Was that before?

A. That was before receiving that other telegram to accept.

Q. Was that before or after you signed the contract?

A. That was before I signed the contract.

Q. Now, about this Exhibit E?

A. That was sent on the same principle as the last one, before the signing of the agreement.

Q. Captain, were these cablegrams, Exhibits D and E, based upon actual facts, or upon suppositions on information that you had obtained from Captain Clark and the agent of Muller & Co.?

267 A. It was just upon my suppositions upon what I had heard—I was not acquainted with the coast.

Q. Now, Captain, what was the actual fact as to the banking of sand around the steamer at the time she was floated?

A. It was hardly perceptible.

Q. Did or not Mr. Clark know the contents of your cablegram from your owners authorizing you to accept tender for $22,000 for performing the work if you could not get lower when he arrived at Velasco to see you?

A. I don't know if he knew the full contents of the cable.

Q. Did he know what your authority was?

A. He knew what my authority was.

Q. Did Brock know what your authority was?

A. Yes, sir.

Q. Did you see Brock after Capt. Clark had come down, or after after you had received the cablegram from your owners?

A. I saw Brock before.

Q. Did you see him after also?

A. Yes, sir.

Q. State when you tried him as to getting lower figures.

A. Both before and after Mr. Clark had come down.

Q. Now, Captain, these seven exhibits that you have been testifying about, did you send them on the strength of your knowledge of the facts and surroundings of that locality prior to the time you arrived at that port, or was your conclusions, as you embodied them in these exhibits, derived from what you saw and what you were informed by the parties you have been testifying about?

A. Well, it was after I arrived—from what I learned after arriving there.

Q. Now, Captain, did the facts as they developed after you sent these cablegrams about the banking of sand, prove that there was any actual banking of sand, and if there was any banking, was it of a great nature, or simply nominal?

A. It was not of a very great nature; as I stated before it was hardly perceptible.

Q. Will you please state whether those cablegrams regarding the banking of sand were a correct prediction, or whether they proved to be erroneous?

A. Well, they proved to be erroneous under the circumstances.

Q. Captain, did you make any inquiry about getting
268 tenders or parties from any other place than Galveston to do this work?

A. Yes, sir.

Q. Whom did you make such inquiries of?

A. I inquired of Mr. Morrissy, likewise of Lloyd's agent.

Q. What did they inform you, if anything?

A. They informed me that the only two that were able to do the work were Clark & Brock, in Galveston, and that if I went to any other place it would cost a great deal more.

Q. Why did they say the cost would be more?

A. On account of their having to come so far and not having any gear on the spot.

Q. Captain, did you know of the steamer *Elfrida* being dry-docked and her bottom examined at Newport News?

A. Yes, sir.

Q. Did you examine her bottom?

A. Yes, sir.

Q. What was her condition?

A. You would not have thought she had been shore at all. There was only one slight indentation on the starboard bilge which might have been done in scraping along the wharf.

Q. What extent was that?

A. A 11-inch surface from a half to three-quarter inch indentation.

Q. State whether or not there was any other damage to the bottom; and, if so, to what extent?

A. There was no other damage to the bottom.

Cross-examination by Mr. STUBBS:

Q. Captain, how do you know that Mr. Morrissey had wired Clark & Co., at Galveston?

A. He told me so.

Q. Did he tell you before he had wired them or afterward?

A. He told me after he had wired them; when he gave me the cable.

Q. How many days altogether were you aground?

A. About 14 days, I think.

Q. The vessel was not loaded?

A. No, sir.

Q. What was her draft?

A. Eleven feet and a half.

Q. What was the depth of the water at ordinary tide, flood tide, where she was grounded?

A. Do you mean after she got off the bottom?

Q. After she was stranded on the beach?

269 A. There was from six to nine feet; of course, the vessel had water ballast in.

Q. What did that ballast consist of?

A. Water ballast.

Q. How much could you have reduced her draft by pumping out the ballast?

A. To about nine feet and a half.

Q. Did you empty out her ballast?

A. Yes, sir.

Q. When was her water ballast emptied out?

A. We pumped it out before the salvors commenced to work.

Q. While they were working on it?

A. Yes, sir.

Q. How many days were they at work altogether?

A. They were two days laying anchors.

Q. How many days pulling her off?

A. About three and a half hours pulling her off.

Q. And two and a half days laying anchors?

A. Yes, sir.

Q. Had you previously attempted to pull her off?

A. No, sir.

Q. Didn't you use her tackle and anchors to get her off?

A. Not while she was stranded on the beach.

Q. Why didn't you do so?

A. Because I hadn't the gear to take it out in deep water.

Q. After she was stranded did you report by cablegram to your owners in England?

A. Yes, sir.

Q. By whom were you advised to send to Galveston for salvors?

A. By Mr. Morrissy.

Q. To whom did he direct you to apply to?

A. To Sorley & Clarke.

Q. Have you a copy of that telegram?

A. I have not.

Q. Did you receive a reply?

A. I haven't that reply.

Q. Nor a copy of it?

A. No, sir.

Q. Do you recollect what you wired to Muller & Co.?

A. Yes, sir.

Q. Please state the substance of it.

A. I wired Mr. Muller asking him to instruct Lloyd's agent to send me assistance, or come down himself.

Q. What was his reply?

A. His reply was, "Have sent you assistance today."

Q. Did Lloyd's agent also come down?

A. No, sir; Lloyd's agent did not come. Mr. Clark came

270 down on Sunday afternoon, and handed me a letter from Mr. Möller.

Q. Have you that letter?
A. I believe it is on board ship.
Q. Can you produce it before you go away?
A. I will send it from Norfolk, Newport News.
Q. We will ask you to do that.
A. All right, sir; I will send it.
Q. Then you wired——
A. To the British consul, as I had received word from Mr. Möller that Lloyd's agent was sick, and could not come down. I then wired to the British consul asking to inform Lloyd's agent that I require his assistance. I received a message from Mr. James Sorley saying that he would come down.
Q. And did he come down?
A. Yes, sir; he came down.
Q. And did he examine the vessel and her situation?
A. He went down and had a look at her while she was on the beach.
Q. Did you consult with him as to what was best to be done?
A. Yes, sir.
Q. And what did he advise?
A. He advised me to ask for tenders to float her.
Q. Did you ask for tenders thereafter, or did you first communicate with your owners?
A. I asked for tenders before communicating.
Q. And then you received two tenders?
A. Yes, sir.
Q. And did you submit them to your owners?
A. I wired them the lowest.
Q. And these telegrams that have been read here, are those the answers?
A. Yes, sir.
Q. Do these cablegrams that have been read show all of your correspondence with your owners by cable?
A. There are more than those; there are others in the other deposition.
Q. These are not all?
A. No, sir.
Q. Where are the others?
A. I only know that Mr. Kirlin has them.
Q. Who is Mr. Kirlin?
A. He is one of the solicitors in the case at New York.
Q. Well, after Capt. Clark came down did he offer you any of his hawsers or tackle to assist you?
271 A. He first asked me if I would let him go on for what the United States court would allow.
Q. That was before he made the tender?
A. Yes, sir.
Q. What did you reply?
A. I told him I would not let him do any such thing.
Q. He told you he was willing to take what the court would allow him?

A. Yes, sir.
Q. And then thereafter you solicited a tender?
A. After Mr. Sorley came down.
Q. You relied upon Mr. Sorley's advice?
A. Certainly.
Q. Did you consult any other persons in regard to the vessel and the best mode of getting her off besides Mr. Sorley?
A. I spoke to Mr. Morrissy—he was like our agent.
Q. Did you consult the pilots down there? You spoke to them in regard to it, didn't you?
A. Yes, sir.
Q. Did you ask them about the danger of the sand forming about the vessel?
A. Yes, sir.
Q. And what did they tell you?
A. They told me that the sand would form around her if the wind came in strong.
Q. You have driven along down this coast, have you not?
A. Yes, sir.
Q. Well, what marine experience have you had—what length of time?
A. About thirteen and one-half years.
Q. Well, did what Mr. Sorley and what the pilots told you and what Mr. Morrissy and Clark told you with regard to the probability of the sand banking around the vessel concur with your own experience of sandy coasts?
A. I have not had any experience along the Gulf coast; there are few coasts where there is such an extent of beach as here.
Q. Are you able to speak, Captain, from your own knowledge and experience as to the tendency of sand along the beach, such as this extending down to Velasco, to form around a stranded vessel?
A. Yes, I have known that.
Q. Could you have told while on the vessel, by sounding or otherwise, whether the sand was forming around her?
A. Oh, yes.
272 Q. Did you examine to see whether it was forming while she was lying there?
A. Yes, sir.
Q. And what did you discover?
A. I found the sand was not making any at all, or very little.
Q. Did you make this investigation before you made this contract?
A. Yes, sir. I sounded once before making the contract, and I sounded afterwards.
Q. The cablegrams that came to you were delivered to you sealed as delivered from the telegraph office?
A. Yes, sir.
Q. Did you wire to New Orleans for bids for salvors?
A. No, sir.
Q. Did you send anywhere else except to Galveston?
A. No, sir.

Q. Did not Captain Clark offer to loan you his hawser?
A. Yes, sir.
Q. Without any charge?
A. He offered me one seven-inch hawser.
Q. Without any charge?
A. Yes, sir.
Q. That was before you had made any arrangements with him?
A. Yes, sir.
Q. Captain, what has become of the original cablegram from your owners authorizing you to accept the tender of 4,580 pounds if lower was impossible?
A. It is in charge of Convers & Kerlin.
Q. Now, do you recollect having testified at Norfolk that the original of that cablegram was filed with the libelant's evidence at Galveston?
A. I don't remember that.
Q. Well, did you testify?
A. I testified that that was the telegram that I received.
Q. Did you testify at Norfolk that the original of that telegram was filed in Galveston here—in court here?
A. No, I don't remember that.
Q. Well, didn't you have the original at Norfolk?
A. Yes, sir.
Q. And you turned it over to Messrs. Convers & Kirlin?
A. Yes, sir.
Q. Then it was there, the original of that telegram?
A. Yes, sir.
273 Q. Now are you able to state, then, whether anybody had a copy of that telegram here?
A. No, sir.
Q. You cannot state?
A. No, sir.
Q. You are sure that the original you had in Norfolk after you left Galveston?
A. Yes, sir.
Q. And you left it there?
A. Yes, sir.
Q. Did anybody have a copy of that telegram here?
A. None but the telegraph office, because it was received in Velasco.
Q. Did Möller & Co. have any copy of that telegram?
A. They ought not to have it.
Q. You never saw any, did you?
A. No, sir.
Q. Do you recollect having testified in Galveston before in this case?
A. What?
Q. Wasn't your testimony taken in this same case in Galveston on or about October 27, 1894?
A. Yes, sir.
Q. Do you not recollect having stated in your testimony taken in

Galveston that the cablegrams authorizing you to enter into a contract for floating the steamship were then at Velasco?

A. Yes, sir.

Q. But that you would forward them to the commissioner taking this testimony, that they might be returned with your testimony and made a part of it?

A. Yes, sir; I did testify to that.

Q. Did you send them to the commissioner?

A. I sent them to Lockhart & Painter.

Q. You do not know whether they were attached to your deposition taken in Norfolk or not?

A. There were telegrams put in, and I think that was one of them.

Q. It was referred to, but not put in. You say you did forward them to Messrs. Lockhart & Painter, but you do not know whether they were filed with your testimony or not?

A. No, sir.

Q. But you undertook to comply with this?

A. Yes, sir.

Q. Captain, I understood that you had just as good means for knowing whether the sand would form around the vessel as any one else had?

A. I am not a native down there. I do not know what it
274 would do in a breeze of wind. Sometimes it will shift in a breeze of wind and sometimes it will not.

Q. You had the same means to find out whether the sand had actually formed or not?

A. Yes, sir, but it did not form.

Q. Did you encounter any heavy gale while you were lying there?

A. No, sir.

Q. Wasn't the wind very high when you were driving ashore?

A. It was a fresh breeze, but it was not a gale at all.

Q. How do you describe it?

A. It was a strong breeze.

Q. Your log says, "Monday, October 15th, very strong southeasterly gale, and very high sea; ship still fast on the ground." Is that correct?

A. There was not a strong gale.

Q. Well, the log was not, then, correct?

A. That is the mate's idea of it; it is not my idea of it. The log is kept by the mate, and not by me.

Q. Was the mate a man of experience?

A. He had been to sea some time.

Q. Had he ever been master over a vessel?

A. No, sir; well he was master for about six weeks.

Q. Do you keep a log book yourself, Captain?

A. No, sir.

Q. Did you put out any coal to lighten her?

A. No, sir.

Q. At whose request did you pump the water ballast out of your ballast?

A. At Mr. Brock's.
Q. Was Mr. Brock working in the salvage?
A. Yes, sir.
Q. Under whom was he working?
A. Mr. Clark.
Q. What vessels and appliances did the salvors have?
A. They had lighters.
Q. How many?
A. Two.
Q. Did they have any tugs?
A. There were two tugs, but only one was used at a time.
Q. How were they with reference to their power; were they strong and powerful?
A. Yes, sir; ordinary tugs.
Q. How far did they pull her through the sand?
A. They didn't pull her at all; the tugs didn't.
Q. How far was she pulled?
A. She was pulled three ship's-length- by the anchor.
275 Q. What distance is that?
A. 770 feet; and then the tugs were put on her after we got her afloat.
Q. Who placed the anchors and tackle?
A. Clark & Co.
Q. Did you lose any anchors or cables?
A. Yes, sir.
Q. Before the salvors commenced work or afterwards?
A. Yes, sir.
Q. Before they commenced work?
A. Yes, sir.
Q. What did you lose there?
A. I lost one anchor and about 14 fathoms of cable; that is the big anchor, and I lost a small anchor and some wire.
Q. About how much wire?
A. About 90 fathoms of it.
Q. What was the value of that vessel?
A. About 22,000 pounds.
Q. That is inclusive of her engines and machinery?
A. Yes, sir; that is as near as I can get to it; it might be less, as they diminish in value all the time.
Q. That is your best judgment?
A. Yes, sir; as near as I can give you.
Q. Do you know whether Mr. Sorley, Lloyd's agent, had any cable from the owners in regard to the bid of Clark?
A. No, sir.
Q. Why didn't you apply to New Orleans for assistance in getting the vessel off?
A. Because I was told it was no use going there.
Q. By whom were you told?
A. By Mr. Morrissy and Mr. Sorley.
Q. By any one else?
A. No, sir.

Q. Did Mr. Sorley advise you to make the contract that you made?
A. Yes, sir; he agreed to it.
Q. Why did your owners direct you to consult Lloyd's agent?
A. They did not direct me to consult Lloyd's. I went there myself.
Q. Why did you go there?
A. Because that is what he is here for.

Mr. PAINTER: I object to the question and answer as being irrelevant and immaterial and not proper cross-examination.

276 Q. Do you recollect having testified in Norfolk, Captain, as to any statement that the clerk of this court made that Muller had employed a lawyer?
A. That was what transpired here when I was having my deposition taken here.
Q. Who was the clerk of the court that stated that?
A. The gentleman sitting up there.
Q. Mr. Hanscom?
A. Yes, sir.
Q. Are these correct copies of the ship's log and the engineer's log? (Copies shown witness.)
A. They are.

Copies of the log books offered in evidence.

Q. Moller & Co. did not tell you, Captain, not to apply to New Orleans for assistance?
A. No; it was their agent, Morrissy.
Q. At Velasco?
A. Yes, sir.
Q. You never spoke to any of the firm of J. Muller & Co. or communicated with them?
A. No, sir; only as before mentioned.
Q. Did any member of the firm of J. Muller & Co. say that Charles Clark & Co.'s tender was the best that you could do?
A. No; only as before mentioned.
Q. Did any member of that firm ever advise you in any way with regard to making this contract with Clark & Co.?
A. There was one copy of the agreement sent up to Velasco with Mr. Clark. I don't know whether Mr. Muller had anything to do with that or not.
Q. You don't know whether Mr. Muller ever saw that?
A. I do not know; no, sir.
Q. Was not the only communication that you received from Muller & Co. at Galveston telegrams to the effect that no other tugs were available except Clark's?
A. No; there were more telegrams than that.
Q. I mean with regard to giving assistance?
A. The first telegram I received from them was to the effect that they had sent assistance, and then after that I got a telegram saying that Mr. Sorley was sick, and then afterwards I had another

telegram from them, when I wired them to send some other tug if Clark could not come, saying there was no other tug, but Clark could leave that night—something to that effect.

277 Q. Is it not a fact that you did not see any members of the firm of J. Muller & Co. until after your contract was made?

A. Yes, sir.

Q. You acted upon your best judgment, Captain, did you not?

A. Yes, sir.

Q. Neither the pilots nor Mr. Sorley had any interest in this contract, did they?

A. No more than advising me what to do.

Q. You have no ground for saying, and as I understand you do not say, that any of those gentlemen, the pilots and Mr. Sorley, misrepresented any matters to you, or intentionally gave you bad advice?

A. No.

Q. Now, Captain, I will ask you, in the situation in which your vessel then was, and with the experience that you have had, could you or not have gotten her off the beach without the assistance that you received?

A. I could have taken her off, had I been provided with the same gear.

Q. But not being provided with the gear that the salvors had you could not have taken her off?

A. No, sir.

Q. And then, I understand, you were obliged to make some arrangements with somebody who could give you that help?

A. Yes, sir.

Q. And those appliances you did not have?

A. No, sir.

Q. Captain, just after the *Elfrida* was afloat was not the weather very bad?

A. Just after?

Q. A day or two afterwards?

Mr. PAINTER: I object to that as not being brought out in direct examination and not being proper cross-examination.

Q. Will you please look at your log and see what it says?

Object to the question and any answer as not being proper cross-examination, the subject not having been brought out in direct examination.

A. This is on the 17th, when they got off. "Weather very fine—6 a. m., Tuesday."

278 Q. What day did you get off?

A. On the 17th.

Q. It was very fine?

A. It was very fine.

Same objection as heretofore made.

A. On the 19th also.

Q. On the 19th it was fine?
A. Yes, sir.
Q. And the 20th.
A. Very fine.
Q. Where were you at that time?
A. We were at Quintana.
Q. Was there any change in the weather shortly after that?
A. No, sir. Monday is fine, Tuesday is fine, Wednesday is fine, Thursday is fine, Friday is fine; it seems to be fine all along.
Q. Captain, have you a copy with you of the contract that you made?
A. No, sir.

It is agreed that Exhibit A, introduced as evidence by libelants in connection with the testimony of Benjamin Burgess, taken before the Honorable W. L. Hanscom, U. S. commissioner, October 27, 1894, is a true and correct copy of the contract referred to in this testimony.

Q. Captain, the original of this contract you left at Norfolk—between you and Clark?
A. I sent it home to my owners.
Q. Do you know where it is now?
A. I expect they have it.
Q. Did Clark & Co. carry out their contract as agreed?
A. Yes, sir.
Q. Were they paid the $22,000 by the vessel, or the owners or yourself?
A. Not by me.
Q. By anybody else?
A. Not that I know of.
Q. You say the money was not paid by you or any one else that you know of?
A. No, sir.
Q. You are satisfied of that, are you?
A. Yes, sir.
Q. The ship has not been turned over to them, has it?
A. No, sir.
Q. You are satisfied of that, too?
A. Yes, sir.

279 Redirect examination by Mr. PAINTER:

Q. Now, you testified that Clark asked you if you would take what the court would allow him for this work?
A. Yes, sir.
Q. You refused to do that?
A. Yes, sir.
Q. Why?
A. Simply because I thought that if he got the work he might extend the work. I have known of that being done.
Q. Were you instructed by any one about this?
A. No.

Q. Now, Captain, you say you drove along the coast here. State when, and from where to where?
A. From Galveston to Velasco.
Q. When; was it after or before the wreck?
A. After.
Q. After she was floated?
A. Yes, sir.
Q. Did you ever drive along the coast, or did you have any experience on the Texas coast, except at that time?
A. Driving long?
Q. Yes, sir.
A. That is the only time that I ever drove along there.
Mr. STUBBS: Captain, you have twice testified before in this case; once in Galveston and once in Norfolk?
A. Yes, sir.
Q. Your testimony was a correct statement?
A. To the best of my knowledge and belief.
Q. At the time that you gave it?
A. Yes, sir.
Q. Did you testify correctly as to the occurrences as they occurred?
A. I answered each question they gave me truthfully.

BENJAMIN BURGESS.

280 (A.)

Number 3. Sent by F. Received by A. Check 8. Received at ——.

OCT. 7, 1894.

Dated Velasco, Texas, Oct. 7th, 1894.

To Pyman, New Castle:

Sinecure (1) Friday scandal (2) signally (3) synoptic (4) artillery (5).

(1) The ship grounded at the entrance of the harbor.
(2) She is fast head & stern.
(3) The ship is in a critical position.
(4) Have sent for assistance.
(5) The ship was in charge of a Government pilot.

(B.)

Number 3. Sent by X. Received by A. Time received, 9.30 a. Check 9.

10, 8, 189–.

Dated Velasco, Texas.

To Pyman, New Castle:

Vessel same position. Lloyd's agent not arrived.

(C.)

Number 22. Sent by X. Received by A. Time received, 7.30 p. Check 33.

10, 9.

Dated Velasco.

To Pyman, Newcastle, Tyne.

Lloyd's agent here serpent (1) Put ship in Galveston including diver, lowest bid forty-five eighty pounds Lloyd's and myself recommend acceptance vessel easy. Bottom sand one thousand feet from deep water.

281 (1) Have advertised for tenders to get the ship afloat, on the principle of "no cure, no pay."

(D.)

Number 5. Sent by X. Received by A. Time received, 9 a. m. Check 15.

10, 11.

Dated Velasco.

To Pyman, New Castle, Tyne:

Delay will cause danger of sand banking, also increase cost of floating.

(E.)

Number 11. Sent by X. Received by A. Time received, 2.45 p. Check 19.

10, 11, 189–.

Dated Velasco.

To Pyman, New Castle, Tyne:

Fresh breeze blowing vessel laying easy making no water afraid of sand banking up.

(F.)

Number 6. Sent by X. Received by A. Time received, 1.50 p. Check 18.

10, 15, 1894.

Dated Velasco.

To Pyman, Newcastle, Tyne:

Have accepted tender forty-five eighty with right to abandon. Lower impossible. Commence work today.

282 (G.)

Number 4. Sent by X. Received by A. Time received, 9 a. m. Check 7.

10, 18, 189–.

Dated Velasco.

To Pyman, New Castle, Tyne:

Elfrida floated. Will survey.

LIBELANTS' EXHIBIT 1.

Log of the S. S. "Elfrida."

Friday, Oct. 5th, 1894.

0.40 a. m.—Stopped engines and took soundings, 14¾ fathoms, bottom brown sand and mud.

2.30 a. m.—Altered course to S. W. x W.

4.0 a. m.—Strong N. E. wind and sea.

7.30 a. m.—Took pilot on board.

7.45 a. m.—Anchored off Velasco bar in 5 fathoms of water, 45 fathoms cable out.

8.0 a. m.—Very strong wind and sea.

0.45 a. m.—Hove up anchor and proceeded, pilot on board.

1.15 p. m.—Ship grounded inside Velasco breakwaters, there being a strong wind and sea on ship's broadside, her bow drifted alongside of the breakwaters, we then run out a kedge from starboard bow and hove taught with windlass, engines going *going* full speed astern, but could not move the ship, wind and sea still increasing.

5.0 p. m.—Run the kedge anchor out again and made another effort to float the ship, but was unable to do so, ship having drifted further on the breakwater.

7.30 p. m.—Tide falling, and there being too much sea on to run out another kedge, we finished with the engines for the night.

Midnight, wind and sea still increasing, ship straining and bumping heavily.

283 Saturday, October 6th, 1894.

6.0 a. m.—Weather slightly moderating.

6.30 a. m.—Made another attempt to float the ship, but without any success.

11.0 a. m.—Wind and sea moderating, tugboat run out starboard bow anchor and 50 fathoms of cable by a six-inch hawser which was badly strained and broken, likewise one coil of 3¼-inch manilla rope was badly strained; we then hove cable taught and waited until high water.

At about 8 p. m., the weather then being at its highest, we hove up on the anchor and worked the engines according to judgment; after pumping on number three tank for some time, ship drifted over breakwater and grounded on the other side; we then let go the port anchor to prevent her from drifting further on to the shore.

9.30 p. m.—Tide falling; finished with the engines for the night.

10.0 p. m.—Run out stream anchor (10 *l*wt.) and 2½-inch wire attached from starboard quarter.

Midnight, wind and sea increasing.

About 2.0 a. m.—Very strong N. E. wind and high sea, cable chain parted and ship drifted further on to the beach. The wire rope aft parted likewise and all were lost.

8.0 a. m.—Wind and sea moderating.

P. m.—Wind and sea still moderating.

Monday, October 8th, 1894.

A. m.—Wind moderating. Crew variously employed.
P. m.—Weather fine and sea smooth.

Tuesday, October 9th, 1894.

A. m.—Wind light and weather fine. Crew variously employed.
P. m.—Moderate S. W. breeze and fine weather.

Wednesday, October 10th, 1894.

A. m.—Very strong southerly gale and high sea, ship straining and bumping heavily. Crew variously employed.
P. m.—Wind and weather the same.

284 Thursday, October 11th, 1894.

A. m.—Strong wind and heavy sea. Crew variously employed.
P. m.—Wind and weather the same.

Friday, October 12th, 1894.

A. m.—Strong wind and heavy sea. Crew variously employed.
P. m.—Wind and weather the same.

Saturday, October 13th, 1894.

A. m.—Moderate easterly breeze. Crew variously employed.
P. m.—Wind and weather the same.

Sunday, October 14th, 1894.

A. m.—Very strong S. E. gale and very high sea; ship fast on the ground.
P. m.—Wind and weather the same.

Monday, October 15th, 1894.

A. m.—Very strong S. E. gale and very high sea; ship still fast on ground.
P. m.—Wind and weather the same.

Tuesday, October 16th, 1894.

A. m.—Wind and weather moderating. Crew assisting to run anchors out from aft, in order to get the ship afloat.
P. m.—Moderate breeze and fine weather.

Wednesday, October 17th, 1894.

A. m.—Weather very fine. This day salvors engaged trying to float ship, they heaving on anchors, with tugboat astern, engines working likewise.
At about 7.30 p. m.—Vessel afloat and proceeded to sea to await daylight to enter. Crew employed assisting salvors, &c.

Thursday, October 18th, 1894.

7.0 a. m.—Arrived and moored alongside of river bank at Quin-

tana to be surveyed. Salvors picking up anchors, which were
285 used to get ship off. Vessel's winches, windlass, cable, likewise ropes were badly strained and damaged. Size of ropes 2.6-inch manilla, 3 coils 3½-inch manilla.

One stream anchor with 2½-inch wire attached and one bow anchor with 15 fathoms cable were lost, salvors being unable to recover them. On examining small boat, we found that it had been badly strained, and leaking; caused by running out kedge anchors.

Friday, October 19th, 1894.

A. m.—Weather very fine.

Surveyors surveyed ship, going through all tanks, bilges, peaks, &c., reporting indentations at various parts of bottom of tanks, where cement was broken. On close examination of the steam steering gear, we found that it had been badly strained; it working very badly, probably by rudder working on sand.

Saturday, Oct. 20th, 1894.

A. m.—Weather very fine. Divers engaged in examining ship's bottom, outside under water. He reporting everything all right with the exception of a few slight indentations.

Had engine turned, and found that propeller had pieces broken off four blades.

LIBELANTS' EXHIBIT 2.

Engineer's Log, Steamship "Elfrida."

October 5th, 1894.

12.35 a. m.—Stopped, took soundings and proceeded.

1.50 a. m.— " " " " "

4.40 a. m.—Slowed down and proceeded, various speeds.

8.0 a. m.—Let go anchor in Velasco roads and finished with engines. Main boiler lying under steam.

1.0 p. m.—Hove up anchor and proceeded full speed ahead.

1.15 p. m.—Ship took the ground in channel and drifted on to breakwater, engine going full speed astern and afterwards
286 proceeding various speeds to telegraph, but could not move the ship owing to fresh wind and heavy cross-swell running round front end of main boiler, leaking in several places and bottom manhole door leaking.

7.30 p. m.—Finished with engines for the night, being unable to do anything through the heavy swell running. Main boiler lying under steam.

October 6th, 1894.

Main boiler lying under steam; still fresh wind with heavy swell.

6.40 a. m.—Working engines to telegraph; engines straining heavily.

7.5 a. m.—Stopped engine not being successful in getting ship off. Main boiler lying under steam.

Try run out stb. anchor, weather having moderated.

8.30 p. m.—Working engines to telegraph, pumping out No. 3 tank and heaving on starboard anchor, ship apparently afloat.

9.30 p. m.—Stopped engine and run up No. 3 tank, ship having drifted over breakwater and grounded on the other side. While the engines were moving we felt heavy thumping at propeller and large volumes of sand passing through condenser.

October 7th, 1894.

Main boiler lying under steam, wind and sea moderating. Engineer and fireman keeping watch, cleaning and doing minor repairs.

9.0 a. m.—Took circulating doors off and found rudder valves all split, replaced them with new ones, took feed delivery valves covers off, found valves damaged and broken, removed valves and put covers on.

9.0 p. m.—While pumping out bilges found lead pipe broken at flange.

October 8th, 1894.

Main boiler lying under steam, light breeze with smooth sea. Engineer and fireman keeping watch, cleaning and doing minor repairs.

287 October 9th, 1894.

Main boiler lying under steam. Engineer and fireman keeping watch and doing minor repairs.

October 10th, 1894.

Main boiler lying under steam. Engineer and fireman cleaning and doing minor repairs.

October 11th, 1894.

Main boiler lying under steam. Engineer and fireman keeping watch, cleaning and doing minor repairs.

October 12th, 1894.

Main boiler lying under steam. Engineer and fireman keeping watch, cleaning and doing necessary small repairs.

October 13th, 1894.

Main boiler lying under steam. Engineer and fireman keeping watch, cleaning and doing minor repairs.

Sunday, October 14th, 1894.

Main boiler lying under steam. Engineer and fireman keeping watch.

Monday, October 15th, 1894.

Main boiler lying under steam. Engineer and fireman keeping watch.

October 16th, 1894.

Main boiler lying under steam. Engineer and fireman keeping watch and doing minor repairs.

October 17th, 1894.

Main boiler lying under steam. Engineer and fireman doing minor repairs.

Salvage company running out anchors, etc.

12.0.—Set donkey fires away to keep steam for deck when working the engines.

4.0 p. m.—Started engines full speed astern and hove on
288 anchor. Engines, steam windlass and wenches strained heavily. Circulating valve split and ballast donkey strained in pumping through condenser.

7.30 p. m.—Cleared the ground and proceeded dead slow.

October 18th, 1894.

Engine proceeding dead slow. Ballast donkey pumping through condenser.

6.20 a. m.—Proceeded full speed ahead into harbor.

7.15 a. m.—Finished with engine.

8.0 a. m.—Set donkey boiler fire away and let main fire die out.

9.0 a. m.—Commenced to pump out tanks and taking doors off.

5.0 p. m.—Banked donkey boiler fire for the night.

October 19th, 1894.

Steam on donkey boiler from 7.0 a. m. to 5 p. m.

Captain and engineer of the *Lizzie* with mate and second engineer examined tanks. They reported a few dents in plates with cement broken but no leakage No. 3 tank suction pipe noted. Engineer renewing circulating pump valves which were split by heavy working of circulating pumps while aground, also repairing ballast donkey and renewing valves. Run out water from main boiler, took doors off ready for to enter tomorrow.

October 20th, 1894.

Steam on donkey boiler from 5.0 a. m. to — p. m.

Put all hands in boilers to roughly clean out the same, which had become very dirty owing to clay and other deposits, carried in by feed donkey while lying aground.

Turned engines to examine propeller and found three blades with six inches to one foot of the hipp carried away, several gaps in sternway edge of blades bush apparently all right.

289 The depositions of Peter Scott and others, taken before me, H. H. Little, a notary public in and for the city of Norfolk, Va., at my office, No. 510 Columbia building, in the city of Norfolk, on Tuesday, November 7th, Wednesday, November 8th, and Thursday, November 9th, 1894, in pursuance to the annexed notice, to be read as evidence on behalf of the respondent in the above-entitled cause now pending.

NORFOLK, VA., *November* 7, 1894.

Met pursuant to notice, and upon the statement of Mr. Kirlin, for the claimants, that the *Elfrida* is now in course of entering the dry dock at Newport News, and it will be impossible for the witnesses to attend until late this afternoon, it is consented that the examination of witnesses, subject to other objections, is adjourned until tomorrow at 10 o'clock.

NORFOLK, VA., *November* 8, 1894.

Met pursuant to adjournment.

Present: Mr. Hanckel, for libelants; Mr. Hughes, for respondent.

Counsel for the libelant excepts to the taking of these depositions for the reason of insufficient notice having been furnished, and for the further ground that proctors for the claimant have otherwise failed to bring themselves within section 863 of the Revised Statutes of the United States under which they propose to take the depositions, and on the further ground that these depositions could have been taken in the eastern district of Texas, where this cause is pending.

It is agreed that these depositions may be taken before H. H. Little, a notary public, instead of W. W. Little, notary public; that they may be taken in shorthand, without requiring the signature of the witness, and that three copies of the testimony shall be made, to be taxed as part of the court costs.

290 PETER SCOTT, on behalf of the respondent, sworn.

Examined by Mr. HUGHES:

Q. State your name, age, residence and occupation.

A. Peter Scott; I am chief mate of the *Elfrida;* age, 29.

Q. What has been your experience as a seaman?

A. I have been captain of the same ship for part of the last voyage. Brought her home from the River Platte. The previous captain died; I have been fourteen years at sea nearly.

Q. In all positions from seaman up to captain?

A. Yes, sir.

Q. What papers do you hold, and from what body, if any?

A. I have got a master's certificate.

Q. Were you on the steamer *Elfrida* the voyage when she got ashore, not long ago, at the mouth of the Brazos river?

A. Yes, sir.

Q. Who kept the log on that voyage?

A. I kept it myself.

Q. Did you make the log in your handwriting?

A. All, sir.

Q. I herewith hand you that log and ask you whether that is the log of the steamer for the period from October 5th to October 20, 1894, both inclusive, and whether the statements therein contained are true?

A. Yes, sir.

It is agreed that a certified copy of the log may be made by the notary, and shall be filed in lieu of the original.

And the same is herewith filed, marked Exhibit "A."

Q. Did you observe the situation of the ship when she got ashore?

A. Yes, sir.

Q. How was she headed and on what kind of a locality was it?

A. We came in about mid-channel and we suddenly grounded aft and with the wind on the broad side it brought her bow upon the submerged breakwater. We made an effort with the kedge anchor to get the ship off and she gradually drifted over on the breakwater.

Q. Do you remember the occasion when the salvors first came to you?

A. Yes, sir; on Tuesday, breakfast time, in the morning.

291 Q. What was the weather then?

A. Moderate fair weather then.

Q. How was the ship then lying?

A. Lying well upon the beach.

Q. Lying easy or not?

A. Yes, sir; quite easy at the time.

Q. Do you know what her draught was when she touched bottom?

A. Somewhere about 12 feet; I could not say exactly; somewhere near 12 feet.

Q. What was the depth of the water, say at her stern, after she got as high upon the beach as she ever went, take it first at low tide and then at high tide?

A. About nine feet of water at high water.

Q. You say the draught of the vessel was 12 feet and thereabouts?

A. As near as I can say.

Q. Was there any way by which you could have diminished her draught?

A. By pumping the ballast out and taking the bunkers out.

Q. Suppose you pumped her ballast out, what could you have brought her draught down to?

A. About 18 or 20 inches; I can't say positively.

Q. You say about. You say when the salvors first arrived it was good weather?

A. Fine weather.

Q. What did they do when they first arrived?

A. Ran out anchors from aft and over the starboard bow; four anchors from aft with two cables and one over the starboard bow.

Q. How long were they occupied in that work, about, as near as you can remember?

A. From breakfast time on Tuesday until dark, about six or seven o'clock, and then they started first thing Wednesday again and she came off about five or six o'clock at night.

Q. Where did they get the steam from that hauled on their anchors and cables?

A. From the ship.

Q. They used, then, the winches of the ship?

A. Winches and windlass of the ship.

Q. How long had they been hauling, after tightening up the cables and getting it in shape, before the ship commenced to move?

A. Perhaps about three or four hours.

Q. You mean they pulled at her three or four hours before she moved at all?

A. No, before she was afloat.

292 Q. I asked how long was it from the time they got their cable taut and everything fixed until the ship commenced to move.

A. Perhaps a half an hour or three-quarters of an hour; I couldn't say exactly; we were busy at the time sending down spars.

Q. Did she come along gradually and easily then?

A. She came along with sudden jerks; we could feel her; there was a jerk and a stop and then another jerk.

Q. How was the weather during that operation?

A. It was fine weather.

Q. Where were the salvors themselves then? Had they any tugboats?

A. Mr. Clarke was in the tugboat and Mr. Brock was on the ship.

Q. What kind of an expedition did the salvors have? What did it consist of?

A. They brought three anchors and hawsers, &c., and small boats.

Q. How many tugboats and lighter-?

A. One tugboat and one lighter there at a time.

Q. Was it smooth enough to use the lighter?

A. Smooth enough; yes.

Q. Was there any danger to anybody in that service?

A. No danger at all.

Q. Did the crew of the ship assist the salvors while they were at work?

A. Yes, sir.

Q. Was there any danger of any sort to them or to the salvors?

A. No, sir.

Q. Was your ship light or loaded?

A. Light, sir.

Q. You didn't have to transfer any cargo then?

A. No.

Cross-examination by Mr. HANCKEL:

Q. When did you say you went there?
A. On the 5th, I think—the 5th of October.
Q. That was Friday. How far was that from Velasco?
A. Just inside Velasco bar.
Q. How far was that from the land?
A. Close to land.
Q. You washed over the jetty or submerged breakwater you call it?
A. Yes, that is the following night, Saturday night.
Q. When did the captain go ashore?
A. On Sunday morning.
293 Q. That was two days then after you got ashore on the breakwater?
A. Yes, sir.
Q. Why didn't he go ashore sooner?
A. He could not possibly get ashore sooner.
Q. Why not?
A. It wasn't prudent.
Q. Why wasn't it prudent?
A. To leave the ship in such position.
Q. How was the weather?
A. A little rough at the time we got ashore.
Q. From Friday to Sunday?
A. Yes, sir; it was rather rough.
Q. What do you mean by rough? Could he go ashore in a yawl?
A. Not to- rough to go ashore, but it was not prudent for the master to go ashore and leave the ship in such position on the beach.
Q. You wrote up that log every day?
A. Yes, sir.
Q. Every day?
A. Yes, sir.
Q. I want to ask you about this water; you say it was nine feet at high water?
A. About nine feet at high water, just directly astern.
Q. And draught of the vessel was twelve feet?
A. Somewhere near twelve feet; I cannot tell you exactly. She was twelve feet and two inches when we left Port Eads, and then we burned two days' bunkers after that.
Q. And she was light, had no cargo at all?
A. No, sir; no cargo.
Q. Did you know anything about any contract; were you present when any contract was made to get this vessel off?
A. No, sir; I know nothing about any contract.
Q. You do not know, then, that it was provided in that contract that the windlass and crew of the vessel were to be used?
A. No, sir; the captain was ashore and made all those agreements.
Q. You were not with him?
A. No, sir; I never left the ship.

And further this deponent sayeth not.
Signature waived.

294 GEORGE BRADLEY, on behalf of the *deponent*, sworn.

Examined by Mr. HUGHES:

Q. State your name, age, residence and occupation.
A. George Bradley; age 29; South Shields; engineer.
Q. What has been your experience as an engineer?
A. Ten years.
Q. What ship are you engineer of now?
A. *Elfrida.*
Q. Were you on her when she got ashore at the mouth of the Brazos river?
A. Yes, sir.
Q. Do you remember the weather when the salvors arrived and went to work?
A. Yes, sir.
Q. How was it?
A. Fine weather.
Q. How was the sea?
A. Smooth, sir.
Q. Did that continue all the time that they were at work or not?
A. Yes, sir; all the time.
Q. Did they use the steam of the ship?
A. Yes, sir; and winches.
Q. Was the engine of the ship disabled at all by her going ashore?
A. Very heavily strained everything. Sand passing through the condenser.
Q. Still it was good enough to make steam and to work the winches?
A. Yes, we can move the engines all the time. We moved the engines to get the ship off full speed, our usual speed.
Q. And the steam of the ship also worked the winches that were pulling on the cables?
A. Yes, sir.

Cross-examination by Mr. HANCKEL:

Q. When you first ran ashore what efforts did you make to get off? Did you use the engines then?
A. Yes, sir.
Q. How often?
A. We got ashore on Friday; I could not say what time exactly; we did not look at the time; somewhere about dinner time; between 12 and 2 o'clock; we worked the engines trying to get her off.
295 Worked them that night again and worked them next morning and Saturday night again, trying to get her off; ran a kedge off but found we could not get her off. She went over the breakwater Sunday morning at 2 o'clock. I was in bed at the time and did not know exactly when it was.
Q. How often did you try to get her off after that by working the engines? I suppose you had kedges out to work the winches?
A. Yes, sir; we tried to get her off.

Q. How often did you do that after Sunday?
A. I do not know how often they worked the winches on deck. We have nothing to do with the anchors.
Q. How often did you work the engines?
A. Until Saturday night. That was the last time we worked the engines until the salvors attempted to get her off.
Q. Do you know whether they ever parted any cables working on her?
A. Yes, sir; they parted one or their anchor, I do not know which it was. The cable broke.
Q. You said something about sand going through the condensers. Will you explain that?
A. Yes, sir; the circulating water and the injection water.
Q. That happened when you were working on her at first?
A. No, when we got ashore. It cannot happen until the bottom touches.
Q. Was it before the salvors took hold?
A. All the time when we were on the beach.
Q. Before the salvors took hold or afterwards? You say you worked the engines Friday, when you went ashore?
A. Yes, sir; worked the engines Friday and also on Saturday.
Q. And all that time sand went through the condensers?
A. I don't know about Friday and Saturday, but when we were on the beach coming off.
Q. You were not present when this contract was made? You know nothing about the contract?
A. No, I have nothing to do with the contract.

And further this deponent saith not.
Signature waived.

296 THOMAS BROWN, on behalf of the respondent, sworn.

Examined by Mr. HUGHES:

Q. State your name, age, residence and occupation.
A. Thomas Brown; age, 35; South Shields; carpenter.
Q. What ship are you attached to?
A. *Elfrida.*
Q. Were you on her when she got ashore at the mouth of the Brazos river, a little over a month ago?
A. Yes, sir.
Q. It was this year, wasn't it?
A. Yes, sir.
Q. Did you observe the weather when the salvors came along to help get you off?
A. It was pretty fine weather, sir.
Q. Did you observe their putting out their tackle—notice when they put out their tackle?
A. Yes, sir; I noticed when they took our anchors away from the ship.
Q. They used some of your anchors?

A. Two of our anchors and cables.

Q. I suppose they also used some of their own?

A. Yes, sir; they had other anchors.

Q. How long did it take them to get their tackle in proper place to commence work?

A. They came after breakfast one day and were at work that day, I think to about dark and part of the next day.

Q. How many vessels did the salvors have down there? How many tugboats and vessels of that sort came down with them?

A. There was one tug fetched a lighter down.

Q. And the lighter?

A. Yes, sir; a lighter.

Q. Any others?

A. There was another tug backwards and forwards there. I do not know what business they were doing.

Q. Well, as I understand, they took one day to get the things in shape. Did they commence to haul on the cables the next day?

A. Yes, sir.

Q. Did they use the ship's steam and winches to do that?

A. Yes, sir.

Q. Did you notice then when they commenced to work; were you observing when they actually commenced pulling on the cables after they got them in shape and all taut?

A. Yes, sir.

297 Q. How long after that was it before the ship commenced to move; how long did it take them after getting things in shape to start the ship?

A. I should say they weren't long pulling before she was making a move.

Q. How could you tell she was moving?

A. She started ragging about first.

Q. After that did she move along pretty steadily?

A. Yes, sir; very steadily.

Q. How long before they got her afloat; I mean as a matter of judgment; I don't suppose you watched a clock or anything of that sort?

A. Some three or four hours, I suppose.

Cross-examination by Mr. HANCKEL:

Q. How far did they haul her before she went afloat from where she was originally?

A. I could not say exactly the distance.

—. I don't want you to say exactly. I want you to estimate it, just as you estimated the time. You were on deck, weren't you?

A. Yes, sir. I might say about 200 fathoms, 200 or 300 fathoms.

Q. Well, how long did you say they were engaged in this operation of getting her off?

A. From just after breakfast one day up to about dark in the evening and then part of the next day before they started to move her.

Q. They worked all one day and part of the next day before they started to move her?
A. Yes, sir.
Q. Did they get her off that second day?
A. Yes, sir; floated her that night.
Q. What time?
A. I should think somewhere about 7 or 8 o'clock.
Q. When the ship was trying to kedge her off, did you break any of the cables?
A. Yes, sir; we broke one cable.
Q. That was before the salvors took hold?
A. Yes, sir; that was Saturday.
Q. Is that anchor lying there yet?
A. As far as I know, it is laying there.
Q. You said there was a tug and lighter and another tug going backward and forwards?
A. Yes, sir.
298 Q. That was the whole equipment for this work?
A. Yes; that is all I know about.
Q. They were all the vessels that worked there. There were other vessels coming down from Galveston?
A. Yes, sir.

And further this deponent saith not.
Signature waived.

Owing to the fact that all of the crew were not able to leave the ship at one time, the further taking of these depositions was adjourned by consent until tomorrow, Friday, November 9, at 12 o'clock.

NORFOLK, VA., *November* 9, 1894.

At 1 o'clock p. m. reassembled.
Present: Mr. Hanckel, for libelant, Mr. Charles Clark; Mr. Hughes, for respondent.

JOHN JAMES DOVE, on behalf of the respondent, sworn.

Examined by Mr. HUGHES:

Q. State your name, age, residence and occupation.
A. John James Dove; aged thirty; West Hartlepool; chief engineer.
Q. Were you chief engineer of the steamer *Elfrida* when she got ashore at the mouth of the Brazos river?
A. Yes, sir.
Q. What has been your experience as marine engineer?
A. Now, sir, nearly ten years.
Q. What kind of papers do you hold?
A. First-class papers.
Q. Please look at the book I now hand you and see if this is the engineer's log of the steamer *Elfrida?*
A. Yes, sir.

Q. Please note the entries therein from October 5th to
299 October 20th, inclusive, and see whether the statements contained in them are true. Who kept the log?

A. I kept the log myself. Yes, they are true.

A copy of the entries in such engineer's log from October 5th to October 20th, inclusive, are herewith filed, marked Exhibit "B," and it is agreed that the same shall be taken and read in lieu of the original.

Q. Was the machinery of your vessel and your steam used in the service of the salvors?

A. Yes, sir; both the main boilers and the donkey boiler—three boilers.

Q. Were any of your anchors used?

A. Yes, sir; I could not say exactly how many there were.

Q. Was your crew also utilized?

A. Yes, sir.

Cross-examination by Mr. HANCKEL:

Q. When did you go ashore?

A. I think it was on the 5th.

Q. What efforts did you make to get off?

A. Run the engines full speed astern, and I think let one of the anchors go.

Q. Did you run the engines all that day?

A. Not all that day—three or four hours.

Q. How about the next day—did you work with the engines the next day?

A. I could not say—yes, I believe we did the next day; I think it was the next day we went over the breakwater.

Q. Look at your log and see if you did work on your engines that day and the next day trying to get off.

A. Yes, sir.

Q. Why couldn't you get off? What was the state of the weather?

A. There was a nasty, bad sea that day, and when we pumped out the tanks she went further over the breakwater.

Q. How was the sea running; on which side?

A. On the starboard quarter.

Q. And that carried you over the breakwater?

A. Yes, sir.

Q. How far did you go over the breakwater?

A. A hundred yards, I should think.

Q. Did you then become embedded in the sand?

A. No; we wern't bedded much.

300 Q. In working your engines did you have trouble about the sand going through your condensers?

A. Yes, sir; a little; not much.

Q. You were over the breakwater, you think, a hundred yards?

A. Yes, sir; as near as I can say.

Q. How far was the vessel's boat from the beach?

A. It would be about the same distance, I should think; a little over, perhaps.

And further this deponent saith not.
Signature waived.

JOHN CARL CHARLESON, on behalf of the respondent, sworn.

Examined by Mr. HUGHES:

Q. State your name, age, residence and occupation.
A. John Carl Charleson; age, thirty-two; South Shields; second mate on the steamer *Elfrida*.
Q. What has been your marine experience? How long have you been following the sea?
A. About eighteen years.
Q. What kind of papers do you hold?
A. Chief mate's.
Q. Were you second mate on the *Elfrida* when she went ashore at the mouth of the Brazos river?
A. Yes, sir.
Q. Do you remember when the salvors came along to commence to work down there?
A. I remember when they came and brought a lighter down on Tuesday morning, that is all I know.
Q. How was the weather then?
A. Pretty fair—fine weather.
Q. What did they do when they first got there?
A. Started to lay one of the anchors out of the lighter and ran a rope to the stern and we took it aboard.
Q. How long did it take them to lay their tackle?
A. They commenced about breakfast time Tuesday morning, and I think got it all down at three the next afternoon.
Q. When they got it fast what did it do?
A. They hove taut on the ropes.
Q. Was the hauling on the ropes done by means of the steam of the ship?
A. The steam winches.
301 Q. When they hauled taut on the ropes, what happened?
A. The ship moved astern.
Q. That started her?
A. Started her a little.
Q. What did they do then; keep on pulling?
A. Yes, sir.
Q. What was the result of that?
A. She gradually moved off.
Q. Then she commenced to move off pretty soon after they got their tackle all taut, did she?
A. Yes, sir; she moved gradually.
Q. About how long did it take her to get afloat?
A. I couldn't exactly tell the quantity of time it was.
Q. You say they commenced to haul at 3?
A. We were all away clear by half past 7 or 8.

Cross-examination by Mr. HANCKEL:

Q. When did you go ashore there?
A. I am sure I could not tell the day.
Q. How long were you ashore?
A. About ten or fourteen days, I think.
Q. What was the state of the weather in that time?
A. Pretty fair during the time.
Q. Did you have any gales?
A. Not what you would call bad weather. I don't call it very bad weather. Only one day we were lying there it was a little bad.
Q. What attempts did you make to get her off?
A. We ran two kedges away, and we got the tugboat down there, and took the bow chain away and anchor in the tug, and we hove on that.
Q. Did you break any hawsers, or anything of that sort, while engaged in that work?
A. Yes, sir.
Q. How many?
A. I could not exactly say how many there was; there was several broken.
Q. You certainly broke one, you know?
A. Yes.
Q. Do you think more than one?
A. In fact all the ropes we have is badly strained and knocked about.
Q. Didn't you break all your anchors and chains? Didn't you lose all your tackle for getting her off?
A. No, not all of it.
Q. Didn't you strain it?
A. Yes, a lot of it strained.
Q. So as to render it useless?
A. No; I don't know.
302 Q. How did you come to Newport News? Come under her own steam?
A. Yes; came along under her own steam.
Q. About how far did you go over that breakwater?
A. Say that is the breakwater (illustrating); she would be lying on that angle on the breakwater, and when we started to try to get her off, heaving on the cable, she ran right across on the other side, inside of the breakwater.
Q. How far did she go?
A. I never measured it.
Q. I just want you to give me some estimate of how many fathoms.
A. I suppose she would be a cable's length inside, or nearly so.
Q. About in what water was she lying when she got inside?
A. About 8 or 8½ feet, I think.
Q. What was the draught of the vessel lying as she was then?
A. Well, with all her ballast in, I think she would be 10 something, between ten and eleven.

Q. You do not know positively?

A. No; I am not interested in that part of it.

Q. How near were you to the beach when you got over the breakwater, the bow of the vessel—her bow toward the beach—she wasn't slewed around?

A. No; she was right ahead on the beach.

Q. How far was the bow from the beach?

A. 200 feet; about that.

Q. You say the weather while they were conducting this operation was pretty fair; how was the weather just after it, while they were getting her off, the next day or two?

A. Well, the same weather all through, nearly all the time I was there. I was there nearly every day we were there, except two days.

Q. When was the first time the captain went ashore after the vessel struck on the breakwater?

A. He was ashore the next morning, I think it would be. I know I pulled him ashore. We run a kedge way in the boat, and I pulled him ashore, and he went up to Quintana. That was Friday evening, I think.

Q. You say he went on shore Friday evening?

A. I think it was Friday.

Q. How was the weather when you went ashore?

A. It was pretty rough.

303 Q. And yet you say the captain could go ashore?

A. Well, it wasn't extra bad when we could get ashore in our own boat.

And further this deponent saith not.

Signature waived.

JOHN BOYLEN, on behalf of the respondent, sworn.

Examined by Mr. HUGHES:

Q. State your name, age, residence and occupation.

A. John Boylen; 46; South Shields; seaman.

Q. What ship are you on now?

A. The *Elfrida*.

Q. Were you one of her crew when she went ashore at the mouth of Brazos river?

A. Yes, sir.

Q. Were you there when the salvors came down and commenced to get to work to get her off?

A. Yes, sir.

Q. How was the weather?

A. Weather was fine, sir.

Q. How was the weather when she got off?

A. Weather was fine then, sir; not bad weather.

Q. The sea the same way?

A. There was no sea on at the time.

Q. How did they get her off, by anchors and cables?

A. Anchors and cables, sir.

Q. How did they put out the anchors?

A. On a lighter, sir.
Q. Was anybody in any danger on that occasion?
A. I don't know, sir.
Q. Well, what did they do first when they first came there, when they first got there?
A. They came out with a lighter and there was anchors and ropes brought and lighters, as far as I could see.
Q. The first thing you noticed they were putting out the tackle?
A. Yes, sir.
Q. Did you notice when they commenced to heave on the tackle?
A. Yes, sir.
Q. Did she commence to move pretty soon after they commenced to heave?
A. Yes, she was not long in commencing to move.
Q. After she commenced did she move right along?
A. Yes; she kept going a little at a time, sir.
304 Q. How long before they got her off; how many hours?
A. I should say about three or four hours.

Cross-examination by Mr. HANCKEL:

Q. How was the weather when you all went ashore there?
A. The weather was fine.
Q. When you went ashore?
A. Yes, sir; there was a breeze of wind, but nothing to speak of; fine weather.
Q. How did you happen to go ashore?
A. Our ship's heel ketched on the ground and she slewed round.
Q. When she first touched, what did she touch on?
A. On the beach, I expect, sir.
Q. What did they do to get her off?
A. Put the engines full speed astern.
Q. Were they unable to get her off?
A. Unable to get her off.
Q. How many attempts did they make to get her off?
A. Made a lot of attempts.
Q. How long did they lie there?
A. On the ground, sir?
Q. Yes.
A. Thirteen days, I think.
Q. You think they made every effort to get her off that could be made?
A. Yes, sir.
Q. Do you think they were unable to get her off by their own exertions?
A. Yes; they were unable to get her off.
Q. About how much water was she lying in when the salvors got there?
A. I didn't see the depth of the water; I should say it would be about seven or eight feet, as far as I can judge.
Q. What was the draught of the vessel?

A. Nine feet forward, I think, sir. I don't know what she was aft, 10 or 11 feet.

And further this deponent saith not.
Signature waived.

305 Captain BENJAMIN BURGESS, on behalf of the respondent, sworn.

Examined by Mr. HUGHES:

Q. State your name, age, residence and occupation.
A. Benjamin Burgess; 28; Sunderland, Eng.; master.
Q. Master of what steamer?
A. The *Elfrida*.
Q. What has been your marine experience?
A. 15 years.
Q. What papers do you hold?
A. Master's.
Q. Were you captain of the *Elfrida*, when she went ashore at the Brazos river?
A. Yes, sir.
Q. Tell how that happened.
A. The vessel in the first place struck on the bar, while in charge of the pilot.
Q. What part of her grounded?
A. The stern.
Q. Was she about in mid-channel when she grounded?
A. She was right in mid-channel.
Q. What was her draught?
A. Eleven feet ten.
Q. She drew too much water to get in that harbor at that time?
A. At that time.
Q. After she grounded what happened to her?
A. Her head swung with the current, the current running westerly with a strong wind on her side and her head went off on the west jetty.
Q. What happened then?
A. She remained there.
Q. How long?
A. Until Sunday morning.
Q. Then did she change her position?
A. She changed her position on Sunday morning; she went over the jetty of the breakwater.
Q. What happened then?
A. She went upon the beach.
Q. Please file with your deposition a rough diagram showing the different positions of the ship as she struck, as she was and as she gradually worked up on the beach?

NOTE.—The witness here offers diagram, and the same is herewith filed, marked "Exhibit C."

A. This jetty ran southeast, and the different positions of the ship are indicated by the figures 1, 2, 3, 4 and 5.

Q. How was the locality there and her position? Was her position, in your judgment, a dangerous one or not?

A. No.

306 Q. Why?

A. The vessel was on a sandy beach, and there was no sea to speak of in there around the ship.

Q. How was the locality there? Was it in an exposed locality?

A. Well, it is partly exposed to southeast winds.

Q. What was the depth of the water in your last position, say at that time?

A. Six or eight feet; six at the stem and eight at the stern.

Q. Did you have any means of lighting the vessel and reducing your draught less than the one you gave just now?

A. Yes, sir.

Q. How?

A. By pumping out the water ballast.

Q. What difference did that make in your draught?

A. That would bring her up to about 9 feet and I could have taken the coal out of her.

Q. What step did you take to get her off? What did you do after you got there and found that you could not get her off by your own efforts?

A. I went on shore then and cabled my owners.

Q. Who were you consigned to?

A. Muller & Co., of Galveston.

Q. Did they not act as your agents in this matter?

A. They were our agents in Galveston according to the charter-party.

Q. You went consigned to them under a charter-party, that made them your agents.

A. Yes, sir.

Q. Well, you cabled the owners giving them the position of your ship?

A. Yes, sir.

Q. What did you do then?

A. I waited—no, I cabled to Sorley, Lloyd's agent at Galveston, for him to come down and inspect the ship and advise me.

Q. Well, did he come?

A. Yes, sir.

Q. What did you do when he came?

A. Asked for tenders to get the ship off.

Q. From whom did you ask tenders?

A. From Messrs. Brock and Charles Clark & Co.

Q. Of what place?

A, Galveston. Brock belongs to Galveston, too.

Q. Are they the only two salvors there?

A. So I was advised.

Q. By whom?

A. By Muller and Sorley.

Q. Did you cable any New Orleans wreckers?
A. No.
307 Q. Why not?
A. I was informed it was not necessary to do so.
Q. Informed by whom?
A. Muller's agent at Velasco, as the charges would be exorbitant.
Q. You were advised by them to limit your applications to the Galveston salvors?
A. Yes, sir.
Q. And you asked for bids from those two?
A. Yes.
Q. Well, did you get bids from them?
A. Yes.
Q. And you accepted one of their bids?
A. The lowest of the two.
Q. The bid of Clark & Co.?
A. The bid of Clark & Co.
Q. After salvage operations commenced did you observe whether the other salvors were interested or not?
A. Yes, he was working for Clark & Co.
Q. He took part in the salvage operation?
A. To the best of my belief, he did.
Q. You saw him working there?
A. I saw him working there; it was his lighters that were used.
Q. What equipments did the salvors have?
A. They had anchors and hawsers; 11-inch.
Q. How many vessels?
A. They had two schooners and two tugboats, the *Seminole* and the *Josephine*, I think that was the name of their boat.
Q. Describe the salvage operations.
A. They commenced working on Tuesday morning at breakfast time, laying four anchors, leaving off work at dusk. Started at daylight on Wednesday morning, working until about three o'clock in the evening, when we started heaving the ship off and about 6.30 or quarter to 7 the vessel was floated in deep water.
Q. How was the weather during that operation?
A. Fine.
Q. How was the sea?
A. Smooth.
Q. Did you observe whether anybody was in any danger or not?
A. No; no danger to anybody.
Q. Any of the property in danger?
A. No.
Q. What kind of tugboats were those they had?
A. Well, the *Josephine* is a small boat, but a boat of good power, and the *Seminole* an ordinary tug, with good power, too.
308 Q. Did you ask Muller & Co. to see if they could get other tugs besides those salvors?
A. Yes, sir.
Q. That was before the contract was made?
A. Yes, sir; I telegraphed them.

Q. And what was their reply?
A. "No other tugs available."
Q. Did you give the libelant the cable from your owners authorizing you to accept the tender of 4,580 if lower impossible?
A. No.
Q. I understand that the original of that telegram is filed with the libelant's evidence?
A. Yes.
Q. Do you know where they got it from?
A. I have no idea where they got it from.
Q. They did not get it from you?
A. No.
Q. Who had any copy of it beside you?
A. Nobody but the telegraph office.
Q. Did Muller & Co., in Galveston, have it?
A. No.
Q. If they had a copy, you did not give it to them?
A. No.
Q. And you did not give a copy to the libelant?
A. No.
Q. Is this the telegram?
A. Yes, sir.

NOTE.—Counsel here hands the witness the telegram, which is herewith filed, marked Exhibit "D."

Q. I herewith hand you the following cables and telegrams and ask you if they are cables and telegrams received by you and that they be filed with your deposition.

NOTE.—Counsel here hands the witness several telegrams, which are herewith filed, marked Exhibit "E."

Q. Were you advised by Muller & Co. and Sorley, Lloyd's agent, to make this contract?
A. They told me it was the best I could do.
Q. Did they tell you that Clark & Co. and Brock were the only salvors in Galveston?
A. Yes, sir, fit to do the work.
Q. And that it was useless to try New Orleans?
A. It was useless to try any other place, as in all probability, if they had come from New Orleans or any other place, the charges would be more, having to come farther.
309 Q. Do you remember when your deposition was taken on behalf of the libelant in this case?
A. Yes.
Q. Do you remember Mr. Clark stating at that time he had not employed the counsel, who were then appearing for the libelant?
A. Yes, sir.
Q. And the statement of the clerk of the court that Muller had?
A. Employed the lawyer.
Q. You remember the occurrence?
A. I remember the occurrence well.

Q. That was the lawyer for the libelant, for Clark & Co.?
A. Yes, sir; Mr. Wilson.
Q. And you also remember the fact that both of these salvors were working on the vessel at the time?
A. Yes, sir.

Cross-examination by Mr. HANCKEL:

Q. When did you first strike ground, Captain?
A. On the 5th, between 1.15 and half past one.
Q. What was the weather?
A. Moderate breeze at the time with slight sea, a one-foot sea about.
Q. Just state the direction?
A. From the eastward.
Q. What did you do that night?
A. Ran out kedge anchors.
Q. What did you run out kedge anchors for?
A. To keep the vessel from going further on the breakwater, trying to get her off in the mid-channel.
Q. I understand you were in mid-channel when you struck?
A. Yes, and our head paid off to the westward.
Q. What did you do next day?
A. We went ashore to get a tug.
Q. Went ashore the next day?
A. Saturday morning.
Q. What did you do with the tug?
A. He run away an anchor for us.
Q. With what result?
A. That night he could not do any more than run the anchor away, as there was a slight sea on the bar, and the tug not having sufficient power, we lay there, on account of the weather, floating until that evening about 8 o'clock, when we tried again to get the ship off, a breeze springing up from the east. We hove on the anchor, which threw her stern over the breakwater and then onto the beach.
310 Q. That was Saturday evening, was it?
A. Yes.
Q. What other attempts did you make to get her off the beach?
A. Made none after we got on the beach.
Q. Did you part any hawsers that day while hauling?
A. We ran out an anchor and cable on Saturday night; it was blowing hard from the southeast then.
Q. How was the weather the rest of that week?
A. Fine, moderate breezes.
Q. All the time?
A. All the time.
Q. How was the weather on Monday, the 15th, when the salvors came there; I warn you because the log is in testimony?
A. Rather a fresh breeze, moderate sea.
Q. Your log says Monday, 15th, "Very strong southeasterly gale and very high sea, ship still fast on the ground." Is that correct?

A. Yes, but cannot call the sea very high. When lying on the beach looking for it, if just a slight swell it would break on the beach. It was only a moderate sea. Were we out at sea it would not be perceptible.

Q. When did you give up the idea of saving the vessel with your own tackle?

A. On Saturday morning.

Q. What did you do then to get her off; what was your idea about getting her off?

A. Running anchors away astern.

Q. I asked you when you gave up the idea of getting her off with your own anchors?

A. The day after you got ashore.

Q. The day after you got ashore?

A. The day after we got ashore.

Q. What did you do then? Went to get the tugboat? Is that the time you went to get the first tugboat?

A. No, we went ashore on Saturday morning when I went ashore. I did not go ashore until we were beached. I was on the ship all the time on the breakwater.

Q. When was she beached?

A. Saturday morning.

Q. And you went ashore then?

A. Yes, sir.

Q. What did you do when ashore?

A. I cabled my owners the situation and telegraphed to Lloyd's agent at Galveston.

Q. Did he come down?

A. He came down.

Q. What did he advise you to do?

A. He advised me to get tenders to float the ship.

311 Q. Who did you get tenders from?

A. Clark and Brock.

Q. Did you make a contract with Mr. Clark?

A. I signed an agreement with Mr. Clark.

Q. That agreement has been filed?

A. Has been filed; yes.

Q. When did Mr. Clark first come there?

A. Sunday evening.

Q. Did you have any conversation with him?

A. I had a few words with him outside of the hotel and we went in.

Q. Did he tender his services then?

A. For what the court would allow him.

Q. What did you say?

A. I told him I was waiting for further instructions from my owners or Lloyd's agent, as I had wired him to come down.

Q. And you were waiting instructions from the owners?

A. Yes, sir; waiting for him.

Q. You got your instructions from the owners?

A. Before I received any word from the owners, Lloyd's and I

put our heads together, talking it over and then advertising for tenders.

Q. You advertised for tenders under instructions from the owners?

A. No.

Q. What did the owners' instructions cover?

A. They did not wire me anything until I wired them about the lowest tender.

Q. What did they wire you in respect to them?

A. There is the cable already put in there.

Q. Did Captain Clark leave a hawser down there when you first saw him Sunday evening on the wharf?

A. I believe he said he did.

Q. Did he say you could make use of it if you wanted to?

A. Yes, sir; he told me that.

Q. He said you could make use of it if you wanted to?

A. Yes, sir.

Q. You say that your vessel drew 11 foot 10 inches, and that you could have reduced it by pumping out the ballast?

A. It was proved.

Q. You also state that you could lighten her by putting out the coal. How much did you have in?

A. 140 tons.

Q. How did you estimate that?

A. By measurement.

312 Q. You measured it after you took it out?

A. Yes, we had coals to bring us back to Newport News.

Q. You signed that contract after receiving the cable from the owners?

A. I asked Mr. Clark first whether he would take any less; he and I had several conversations on that, but he said he could not accept any less. The vessel was in danger of forming a bank of sand around her, and being advised likewise by Muller's agents, that if the vessel staid there much longer she was likely to form a bank, and the likelihood of not getting her off would be increased. I then signed the agreement with Captain Clark after that transpired.

Q. How near was the vessel from the beach?

A. From 300 to 400 feet.

Q. How far was she over the breakwater?

A. She would be about the same distance, as near as I can judge.

Q. About — deep was she in the sand?

A. She was about two feet.

Q. Along her whole length do you mean or on the stern?

A. On the stern the most.

Q. They had to pull her off then about 300 or 400 feet?

A. That was before she was lightened by the ballast, but after pumping that out and working the engines, we worked her loose and raised her that much.

Q. Why didn't you do that before you employed the salvors?

A. It would not be prudent to pump her out before we got anchors out, or she would get on the beach.

Q. When did you pump her out?

A. When the salvors got the anchors out.
Q. You pumped her out then?
A. Yes, sir.
Q. And took the coal out?
A. No; didn't take the coal out then; didn't lighten her that much.
Q. You say the weather was fine all the time you were lying on the beach?
A. Moderately fair.
Q. How was the weather just after this operation?
A. There were moderate breezes to fresh, but nothing to speak of.
Q. What would have been the effect of those winds on the vessel where she was lying?
A. It would not have affected her at all.
313 Q. Are you familiar with that coast?
A. I ought to be; I have driven all along it in a cart.
Q. How often have you been there on vessels?
A. I have not been there often. This is the first time to Velasco.
Q. Did you telegraph Muller anything about accepting any other bid if Clark could not come?
A. Yes; told him to engage other tugs if Clark was not ready to come.
Q. You naturally were pretty anxious to get off that beach?
A. That was what was the matter. It was the same as anybody else would have been in the same position.
Q. Did you know whether Mr. Sorley had a cable from the owners in regard to the acceptance of this bid of Clark's?
A. I don't know anything about that, sir.
Q. I see by the telegram from the owners that you were instructed to try to include in agreement "if steamer after coming off, not worth amount of salvage, steamer in damaged state, could be taken in payment of salvage," was that incorporated in the agreement.
—. Yes; you will see it in the agreement there.
Q. Was that survey held?
A. Survey?
Q. Yes.
A. It was held, but it was not accepted.
Q. Did you ever offer to turn her over to the salvors?
A. No; because the ship was not accepted by the American Insurance Company; they told me that before——
Q. You never offered to turn her over?
A. No, because I did not know what was the matter until she was docked.

And further this deponent saith not.
Signature waived.

314 EXHIBIT "A."

Log Book of the S. S. "Elfrida," of Newcastle-upon-Tyne; Commenced Oct. 3rd, 1894; Ended Oct. 20th, 1894—Peter Scott, Mate.

Log of the S. S. "Elfrida" from Port Eads towards Velasco.

H.	K.	F.	Courses.	Winds.	Deviation.		Remarks: Friday, the 5th day of October, 1894.
					By card.	By obser.	
					Pt.		
1	9	....	West.	North	½ W.	Nil.	0.40 a. m.—Stopped engines and took soundings, 14¾ fathoms, bottom brown sand & mud.
2	9	....	"	"	"	"	
3	9	....	S. W.	"	¼ W.	"	2.30 a. m.—Altered course to S. W. x W.
4	9	....	"	"	"	"	4.0 a. m.—Strong N. E. wind and sea.
6	9	....	"	N. E.	"	"	7.30 a. m.—Took pilot on board.
7	9	....	"	.....	.....	.....	7.45 a. m.—Anchored off Velasco bar in five fathoms water. 45 fathoms cable out.
8	9	....	"				
				"	"	"	8.0 a. m. — Very strong wind & sea.

0.45 a. m.—Hove up anchor and proceeded, pilot on board.

1.15 p. m.—Ship grounded inside Velasco breakwater, there being a strong wind and sea on ship's broadside, her bow drifted alongside of the breakwaters, we then run out a kedge from starboard bow and hove taught with windlass, engines going full speed, but could not move the ship, wind and sea still increasing.

5.0 p. m.—Run the kedge anchor out again and made another effort to float the ship, but was unable to do so, ship having drifted further on to the breakwater.

315 7.30 p. m.—Tide falling, and there being too much sea on to run out another kedge, we finished with the engines for the night.

Midnight, wind and sea still increasing, ship straining and bumping heavily.

Barometer: 8 a. m., 29.8; 8 p. m., 29.8.

PETER SCOTT, *Chief Mate.*

Log of the S. S. "Elfrida" from Port Eads towards Velasco.

Remarks: Saturday, the 6th day of October, 1894.

6 a. m.—Weather slightly moderating.

6.30 a. m.—Made another attempt to float the ship, but without any success.

11 a. m.—Wind and sea moderating. Tugboat run out, starboard, bow anchor and 50 fathoms cable, by a six-inch hawser, which was

badly strained and broken, likewise one coil of 3¼-inch manilla rope was badly strained; we then hove cable taut and waited until high water.

At about 8 p. m., the water then being at its highest, we hove upon the anchor and worked engines according to judgment, after pumping on No. 3 tank for some time, ship drifted over breakwater and grounded on the other side. We then let go the port anchor to prevent her from drifting further on to the shore.

9.30 p. m.—Tide falling, finished with the engines for the night.

10 p. m.—Run out stream anchor (10 cwt.) and 2½ inch more more attached to starboard quarter.

Midnight, wind and sea increasing.

PETER SCOTT, *Chief Mate.*

316 *Log of the S. S. "Elfrida" from Port Eads towards Velasco.*

Remarks: Sunday, the 7th day of October, 1894.

About 2 a. m.—Very strong N. E. wind and high sea, cable chain parted and ship drifted further on to the beach. The wire rope aft parted likewise and all were lost.

8 a. m.—Wind and sea moderating.

P. m.—Wind and sea still moderating.

PETER SCOTT, *Chief Mate.*

Log of the S. S. "Elfrida" from Port Eads towards Velasco.

Remarks: Monday, the 8th day of October, 1894.

A. m.—Wind moderating. Crew variously employed.

P. m.—Weather fine and sea smooth.

Tuesday, 9th October, 1894.

A. m.—Wind light and weather fine. Crew variously employed.

P. m.—Moderate S. W. breeze and fine weather.

Wednesday, 10th October, 1894.

A. m.—Very strong southerly gale and high sea, ship straining and bumping heavily. Crew variously employed.

P. m.—Wind and weather the same.

Thursday, 11th October, 1894.

A. m.—Strong wind and heavy sea. Crew variously employed.

P. m.—Wind and weather the same.

Friday, Oct. 12th, 1894.

A. m.—Strong wind and heavy sea. Crew variously employed.

P. m.—Wind and weather the same.

Saturday, the 13th day of October, 1894.

A. m.—Moderate easterly breeze. Crew working variously.

P. m.—Wind and weather the same.

317 Sunday, 14th Oct., 1894.

A. m.—Very strong S. E. gale and very high sea, ship fast on the ground.

P. m.—Wind and weather the same.

Monday, 15th October, 1894.

A. m.—Very strong S. E. gale and very high sea, ship still fast on the ground.

P. m.—Wind and weather the same.

Tuesday, 16th Oct., 1894.

A. m.—Wind and weather moderating. Crew assisting to run anchor out from aft, in order to get the ship afloat.

P. m.—Moderate breeze and fine weather.

Wednesday, 17th Oct., 1894.

A. m.—Weather very fine. This day salvors engaged trying to float ship, they heaving on anchors, with tugboat astern, engines working likewise.

PETER SCOTT, *Chief Mate.*

Wednesday, the 17th day of October, 1894.

At about 7.30 p. m.—Vessel floated and proceeded to sea to await daylight to enter. Crew employed assisting salvors, &c.

Thursday, Oct. 18th, 1894.

7 a. m.—Arrived and moored alongside of river bank at Quintana to be surveyed. Salvors picking up anchors, which were used to get ship off.

Vessel's winches, windlass, cables, likewise ropes, were badly strained and damaged. Size of ropes 2.6-inch manilla, 3 coils 3½-inch manilla.

One stream anchor with 2½-inch wire attached, and one bow anchor with 15 fathoms cable were lost; salvors being unable to recover them.

On examining small boat, we found that it had been badly strained and leaking, caused by running out kedge anchors.

Friday, Oct. 18th, 1894.

A. m.—Weather very fine. Surveyors surveyed ship, going through all tanks, bilges, peaks, &c., reporting indentations at various parts of bottom in tanks, where cement was broken.

PETER SCOTT, *Chief Mate.*

318 *Log of the S. S. "Elfrida" at Quintana.*

Friday, the 19 day of October, 1894.

On close examination of the steam steering gear, we found that it had been badly strained; it working very badly, probably by rudder working on sand.

Saturday, Oct. 20th, 1894.

A. m.—Weather very fine.

Divers engaged in examining ship's bottom, outside under water, he reporting everything all right, with the exception of a few slight indentations.

Had engines turned and found that propeller had pieces broken off four blades.

PETER SCOTT, *Chief Mate.*

CORPORATION OF THE CITY OF NORFOLK :

I hereby certify this to be a true copy of the entries in the log book of the S. S. *Elfrida* from Oct. 5th to Oct. 20th, 1894, inclusive.

H. H. LITTLE,
Notary Public.

EXHIBIT "B."

Engineer's Log, Steamship "Elfrida."

October 5th, 1894.

12.35 a. m.—Stopped, took soundings and proceeded.
1.50 a. m.— " " " " "
4.40 a. m.—Slowed down and proceeded, various speeds.
8.00 a. m.—Let go anchor in Velasco roads and finished with engines. Main boiler lying under steam.
1.00 p. m.—Hove up anchor and proceeded full speed ahead.
1.15.—Ship took the ground in channel and drifted on to breakwater, engine going full speed astern and afterwards proceeding various speeds to telegraph, but could not move the ship 319 owing to fresh wind and heavy cross-swell running; found front end of main boiler leaking in several places and bottom manhole door leaking.
7.30 p. m.—Finished with engines for the night, being unable to do anything through the heavy swell running. Main boiler lying under steam.

October 6th, 1894.

Main boiler lying under steam; still fresh wind with heavy swell.
6.40 a. m.—Working engines to telegraph; engines straining heavily.
7.05 a. m.—Stopped engine, not being successful in getting ship off. Main boiler lying under steam.
Try run out stb. anchor, weather having moderated.
8.30 p. m.—Working engines to telegraph; pumping out No. 3 tank and heaving on starboard anchor; ship apparently afloat.
9.30 p. m.—Stopped engine and run up No. 3 tank, ship having drifted over breakwater and grounded on the other side; while the engines were moving we felt heavy thumping at propeller and large volumes of sand passing through condenser.

October 7th, 1894.

Main boiler lying under steam, wind and sea moderating. Engineer and fireman keeping watch, cleaning and doing minor repairs.

9.0 a. m.—Took circulating doors off and found rubber valves all split, replaced them with new ones, took feed-delivery valves covers off, found valves damaged and broken, renewed valves and put covers on.

9.0 p. m.—While pumping out bilges found lead pipe broken at flange.

October 8th, 1894.

Main boiler lying under steam, light breeze with smooth sea. Engineer and fireman keeping watch, cleaning and doing minor repairs.

October 9th, 1894.

Main boiler lying under steam. Engineer and fireman keeping watch and doing minor repairs.

320 October 10th, 1894.

Main boiler lying under steam. Engineer and fireman cleaning and doing minor repairs.

October 11th, 1894.

Main boiler lying under steam. Engineer and fireman keeping watch, cleaning and doing minor repairs.

October 12th, 1894.

Main boiler lying under steam. Engineer and fireman keeping watch, cleaning and doing necessary small repairs.

October 13th, 1894.

Main boiler lying under steam. Engineer and fireman keeping watch, cleaning and doing minor repairs.

Sunday, October 14th, 1894.

Main boiler lying under steam. Engineer and fireman keeping watch.

Monday, October 15th, 1894.

Main boiler lying under steam. Engineer and fireman keeping watch.

October 16th, 1894.

Main boiler lying under steam. Engineer and fireman keeping watch and doing minor repairs.

October 17th, 1894.

Main boiler lying under steam. Engineer and fireman doing minor repairs.

Salvage company running out anchors, &c.

12.0.—Set donkey fires away to keep steam for deck when working the engines.

4.0 p. m.—Started engines full speed astern and hove on anchor. Engines, steam windlass and wenches strained heavily. Circulating valve split and ballast donkey strained in pumping through condenser.

7.30 p. m.—Cleared the ground and proceeded dead slow.

October 18th, 1894.

Engine proceeding dead slow. Ballast donkey pumping through condenser.

6.20 a. m.—Proceeded full speed ahead into harbor.

321 7.15 a. m.—Finished with engine.

8.0 a. m.—Set donkey boiler fire away and let main fire die out.

9.0 a. m.—Commenced to pump out tanks and taking doors off.

5.0 p. m.—Banked donkey boiler fire for the night.

October 19th, 1894.

Steam on donkey boiler from 7.0 a. m. to 5 p. m.

Captain and engineer of the *Lizzie* with mate and second engineer examined tanks. They reported a few dents in plates with cement broken but no leakage. No. 3 tank suction pipe noted. Engineer renewing circulating pump valves which were split by heavy working of circulating pumps while aground, also repairing ballast donkey and renewing valves. Run out water from main boiler, took doors off ready for to enter tomorrow.

October 20th, 1894.

Steam on donkey boiler from 5 a. m. to — p. m.

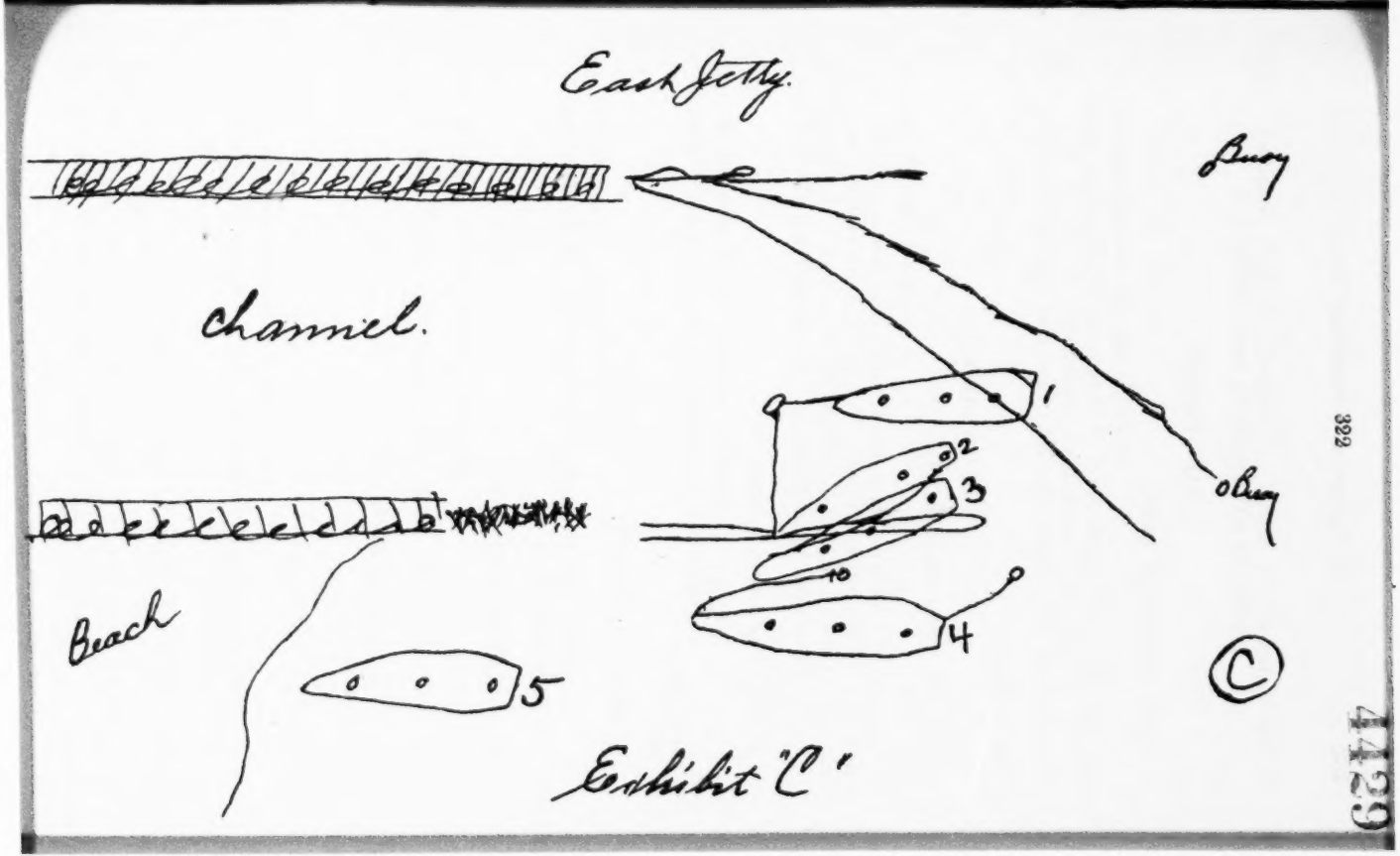
Put all hands in boilers to roughly clean out the same, which had become very dirty owing to clay and other deposits, carried in by feed donkey while lying aground.

Turned engines to examine propeller and found three blades with six inches to one foot of the lipp carried away, several gaps in sternway edge of blades, bush apparently all right.

I hereby certify this to be a true copy of the entries in the engineer's log of the S. S. *Elfrida* from October 5th to 20th, 1894, inclusive.

H. H. LITTLE,
Notary Public.

(Here follows diagram marked p. 322.)



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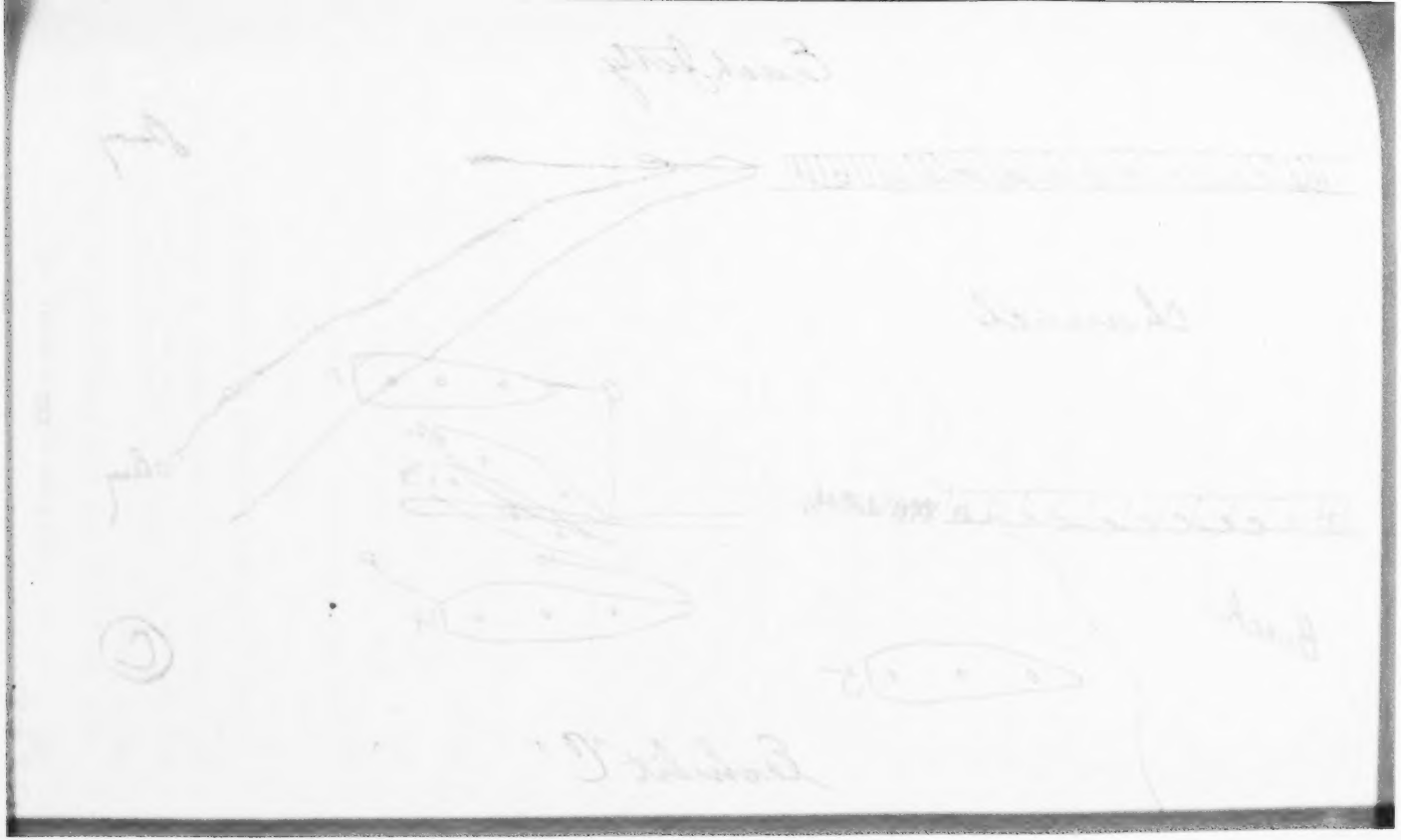

323 *Copies of Telegrams Received by Captain B. Burgess, Master of S. S. Elfrida, and Filed with His Deposition.*

EXHIBIT "D."

Dated NEWCASTLE, TYNE.

To Burgess, steamer *Elfrida*, Velasco:

Accept tender forty-five eighty if lower impossible. No cure no pay. Try include in agreement if steamer after coming off not worth amount salvage, steamer in damaged state to be taken in payment salvage.

PYMAN.

EXHIBITS "E."

Dated NEWCASTLE, TYNE, 8.

Steamer *Elfrida*, Velasco:

Gladdening, Speaker, Surgeon, Sexton, Governing. (Translation) (How are matters progressing. What are the probabilities of ship getting off. Is she much damaged. What is the nature of the ground where the ship struck. Keep us fully informed.)

Dated GALVESTON, TEX., 13.

Capt. B. Burgess, steamer *Elfrida*, Velasco:

Captain Clark goes down tonight with boat and men.

SORLEY.

Dated GALVESTON, 13.

Captain B. Burgess, steamer *Elfrida*:

Clark with his tug and appliances proceeds this afternoon.

J. MOLLER & CO.

324 Dated GALVESTON, TEX., 8.

Capt. B. Burgess, S. S. *Elfrida*, Velasco:

Will come down tomorrow. Meantime run anchors to keep afloat.

JAMES SORLEY,
Lloyd's Agent.

Dated GALVESTON, TEX., 12.

Captain B. Burgess, S. S. *Elfrida*, Velasco:

Contract price agreed upon. Will get things ready to start.

CHAS. CLARK & CO.

Dated NEWCASTLE, TYNE, *Oct. 18th*, 1894.

Steamer *Elfrida*, Velasco:

When where survey is finished relishing and raftbridge by Lloyds can you save cancelling date roasted which is nearest.

(*Translation.*)

"Relishing"—If report of the survey or divers is favorable. "Raftbridge"—Certificate of seaworthiness granted. "Roasted"—Must the ship be put into dry dock.

Dated NEWCASTLE, TYNE.

Burgess, steamer *Elfrida*, Velasco, Texas:

Don't act without our instructions. Lloyd's underwriters communicating direct as consider tender excessive; try get condition in tender giving us right abandon vessel to salvors in lieu of salvage charges.

Dated GALVESTON, TEX., 13.

Capt. B. Burgess, steamer *Elfrida:*

Unfortunately no other tugs here to be had. Clark making
325 all possible progress to get his tug, hawsers and anchors and material ready. Expect him ready soon. Will wire again later.

J. MOLLER & CO.

Certificate from Weather Bureau.

U. S. Weather Bureau.

Division of records and meteorological data.

Letter of transmittal follows.
No tide obsvs. made by Weather Bureau.

Messrs. Convers & Kirlin, 5 Beekman St., N. Y. city.

UNITED STATES OF AMERICA,
DEPARTMENT OF AGRICULTURE,
WASHINGTON, D. C., *March* 6, 1895.

Pursuant to section 882 of the Revised Statutes, I hereby certify that it appears from the records of the Weather Bureau, Washington, D. C., that the annexed extract copy of the original records of meteorological observations made by an observer of the Weather Bureau in the office of observation at Galveston, Texas, on the dates and at the hours specified, has been compared with and is a true extract copy of the original records on file in the Weather Bureau.

MARK W. HARRINGTON,
Chief of Weather Bureau.

Be it known, that Mark W. Harrington, who signed the foregoing certificate, is the chief of the Weather Bureau, and that to his attestation as such full faith and credit are and ought to be given.

In witness whereof I have hereunto set my hand, and caused the seal of the Department of Agriculture to be affixed, on this sixth day of March, one thousand eight hundred and ninety-five.

J. STERLING MORTON,
[SEAL.] *Secretary of Agriculture.*

U. S. Department of Agriculture,
Weather Bureau, Washington, D. C.

Extract from the Original Record of Observations Made by the Observer of the Weather Bureau at Galveston, Texas, on October 4th to 25th, 1894, at 8 a. m. and 8 p. m., 75th Meridian Time, or 6.41 a. m. and 6.41 p. m. Local Time.

Date.	Temperature.						Wind.								State of weather.		Precipitation.					
	Air.		Highest.		Lowest.		Direction.		Velocity, miles per hour.		Maximum since last observation.		Direction.				Began.		Ended.		Amount.	
Oct., 1894.	8 a. m.	8 p. m.	8 a. m	8 p. m.	8 a. m.	8 p. m.	8 a. m.	8 p. m.	8 a. m.	8 p. m.	8 a. m.	8 p. m.	8 a. m.	8 p. m.	8 a. m.	8 a. m.	8 p. m.	8 p. m.	8 a. m.	8 p. m.	8 a. m.	8 p. m.
4	79.1	83.9	86.8	85.0	78.6	78.6	S.	N.	1	13	9	16	S.	N.	Cloudy	Cloudy					.00	.00
5	70.9	75.0	85.0	79 5	70.0	70.0	N. E.	N. E.	22	14	26	25	N. E.	N. E	P'tly cloudy	P'tly cloudy					.00	.00
6	66.6	74.0	79.5	75.3	64.5	64.0	N. E.	E.	13	11	18	18	N. E	N. E.	Clear	Clear					.00	.00
7	67.0	80.0	75.3	82 8	66 0	66.0	N. E.	N. E.	12	4	15	12	N. E	N. E.	Clear	Clear					.00	.00
8	68.0	73.1	82.8	75.6	67 3	65.7	N.	N.	28	18	33	29	N.	N.	Clear	Clear					.00	.00
9	60.5	69 0	75.6	70.6	59 6	59.6	N. E.	S.	13	7	24	15	N.	N. E	Clear	Clear					.00	.00
10	75.8	77.5	76.5	82.9	69.0	69.0	S.W.	S. E.	5	11	11	15	S.W.	S. E	Clear	Clear					.00	.00
11	75 7	75.0	82.9	79 8	75.0	75 0	S. E.	S. E.	9	14	15	18	S. E.	S. E.	Clear	Clear					.00	.00
12	76.1	76.6	79.8	81 0	75.0	75 0	S.	S. E.	6	11	16	12	S. E.	S. E.	Cloudy	Clear					.00	.00
13	70.9	75.0	81 0	77.9	68 8	68.8	N E.	N. E.	9	14	24	24	N. E.	N.	Clear	Clear	R. 1.53 a. m.	2.16 a. m.			.13	.00
14	68 3	69.0	77 9	72.9	66.6	66.6	E.	E.	15	7	18	21	N. E.	E.	Clear	Clear					.00	.00
15	65 7	69.0	72 9	75.8	64.9	64.9	E.	S. E.	9	11	15	14	N. E.	E.	Clear	Clear					.00	.00
16	71.0	70.1	73 8	73.7	68.8	68.8	S. E.	S. E.	5	7	13	15	S. E.	E.	Clear	Clear					.00	.00
17	68.0	72 0	73.7	75.9	66.6	66 6	S. E.	S. E.	3	3	9	9	S. E.	S. E.	Clear	Clear					.00	.00
18	72.1	74 8	75.9	80.0	71 0	71.0	S.	S. E.	5	8	9	13	S. E.	S. E.	Clear	Clear					.00	.00
19	74.2	74 8	80.0	80.4	73.9	73 9	S.	S. E.	4	11	13	16	S.	S. E.	Clear	Clear					.00	.00
20	75.1	76.0	80.4	80.5	74.1	74.1	S.	S. E.	5	14	12	15	S. E.	S. E.	Clear	Clear			R. 10.47 a.m.	12.07 p. m.	.00	.15
21	76.1	76 0	80.5	80.5	75.4	71.0	S.	S.	9	6	16	15	S.	S.W.	Cloudy	Clear					.00	.00
22	74.2	76.0	80.5	82.8	73.6	73 6	N.W.	S. E.	2	8	8	9	S.	N.W.	Clear	Clear					.00	.00
23	73.0	76.5	82.8	81 9	72.0	70.8	S. E.	S. E.	6	5	8	10	S. E	N.	Cloudy	Clear					.00	.00
24	73.0	76.6	81.9	85.6	71.9	71.9	W.	S. E.	8	5	9	8	W.	N.W.	P'tly cloudy	Clear					.00	.00
25	71.0	75.5	85.6	81.8	70.0	70.0	W.	S.W.	5	11	7	14	S. E.	S.W.	P'tly cloudy	Clear						

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327 *Final Decree.*

Entered October 29, 1895.

United States District Court, Eastern District of Texas, at Galveston.

CHARLES CLARKE & Co.
vs.
STEAMSHIP "ELFRIDA," HER TACKLE, &c. } No. 672. In Admiralty. Libel for Salvage.

This cause came on to be heard at this term, the libelants and respondents appearing by their proctors, respectively, and both parties announcing ready for a final hearing of the cause, thereupon a hearing of the cause was had before the court, and submitted; and the court having heard the pleadings and the evidence, and argument, upon due consideration the court finds from the evidence that the services rendered by the libelants in saving the steamship *Elfrida*, her tackle, apparel and furniture, were and are salvage services, and are entitled to be paid for and compensated as and for salvage services.

The court further finds from the evidence that the said salvage services were rendered by the libelants in saving the said steamship, her tackle, &c., under a contract in writing, made between the libelants and Benjamin Burgess, the master of said steamship *Elfrida*, in possession of said steamship at the time, and as such master was duly authorized to make the same; and the court further finds from the evidence that said contract was a lawful contract, and that the same was entered into by the said master of said steamship with full knowledge or means of knowledge of the said master
328 and of the owners of said steamship of all the conditions then existing, and that the amount named in said contract was not unreasonable under the said conditions.

And it appearing to the court that the said steamship *Elfrida*, her tackle, apparel and furniture, have been taken out of the possession of the marshal and out of the possession of this court, upon a stipulation duly executed by the claimants and respondents, Pyman, Bell & Co., in the sum of forty-four thousand dollars ($44,000), with M. Lasker and M. Ullmann, as sureties thereon, and that said stipulation remains in the place and stead of the said property.

Wherefore, it is now here considered, adjudged and decreed by this court that the libelants herein, Charles Clarke and Robert P. Clark, composing the firm of Charles Clarke & Co., do have and recover of and from the claimants herein, Pyman, Bell & Co., and of and from the sureties upon their stipulation, M. Lasker and M. Ullmann, the sum of twenty-two thousand dollars ($22,000), the contract price for the services performed, with interest thereon from the 18th day of October, 1894, at the rate of six per cent. (6 %) per annum, until paid, and all costs about this suit incurred; and in default of the full payment and satisfaction of this decree within 30 days from this date, or of suspension of this decree by appeal, then

summary execution shall issue against said claimants and respondents, Pyman, Bell & Co., and against their said sureties M. Lasker and M. Ullmann, for said sum of $22,000, and interest and costs.

It is further ordered that execution may issue against each party for all costs incurred by them, respectively, after the expiration of 30 days.

D. E. BRYANT, *Judge.*

329 *Petition of Respondents for Appeal and Order Allowing Same. Filed November* 26, 1895.

United States District Court, Eastern District of Texas.

CHARLES CLARKE and ROBERT P. CLARKE, Composing the Firm of Charles Clarke & Co., Libelants,
vs.
THE S. S. ELFRIDA; PYMAN, BELL & Co., Claimants.
} A. D., 672. Appeal.

To Honorable David E. Bryant, district judge, and the honorable the judges of the United States circuit court of appeals for the fifth circuit:

The above-named claimants, Pyman, Bell & Co., considering themselves aggrieved by the final decree of this court, made and entered in this cause on or about the 29th day of October, 1895, hereby appeal from said final decree and decision to the United States circuit court of appeals for the fifth circuit, and file herewith an assignment of errors, as required by law, and thereupon pray that their said appeal may be allowed, that a transcript of the record, testimony, proceedings and papers on which said final decree was made may be sent up, duly authenticated, to the said United States circuit court of appeals for the fifth circuit, and that a citation in due form be issued, citing the libelants to appear in answer to the said appeal.

PYMAN, BELL & CO.,
By CONVERS & KIRLIN,
WM. B. LOCKHART,
Proctors for the Claimants.

330 Upon the foregoing petition of appeal and upon reading and filing of the assignment of errors, the above appeal of the claimants is allowed.

D. E. BRYANT,
United States District Judge for the Eastern District of Texas.

Dated November 25, 1895.

United States Circuit Court of Appeals for the Fifth Circuit.

PYMAN, BELL & Co., Claimants of the Steamship *Elfrida*, Appellants,
against
CHARLES CLARKE and ROBERT P. CLARKE, Composing the Firm of Charles Clarke & Co., Libelants, Appellees.

Assignments of Error.

The appellants assign error in the final decree and decision of the district court herein, in the following particulars:

First. For that the said court found that the alleged contract for salvage was freely and voluntarily made, and was binding upon the *Elfrida*, and awarded judgment thereon for the full amount thereof.

Second. For that the court found that the master of the *Elfrida* was duly authorized to make the said alleged contract.

Third. For that the court found that said alleged contract was a lawful contract.

331 Fourth. For that the court found that said alleged contract was entered into by the master of said steamship with full knowledge or means of knowledge of the said master, and of the owners of said steamship, of all the conditions then existing.

Fifth. For that the court found that the amount of $22,000 named in said alleged contract as the price for the services to be performed was not unreasonable under the conditions existing when the same was entered into.

Sixth. For that the court refused and omitted to find that the said alleged contract was signed by the captain under practical or constructive compulsion and duress, and was therefore not binding upon the property of the claimants.

Seventh. For that the court refused and omitted to find that the said alleged contract was signed by the master improvidently for an excessive and exorbitant compensation, and was therefore not binding upon the claimants' property.

Eighth. For that the court refused and omitted to find that the said alleged contract was obtained from the master through collusion between the libelants and the only other bidder for the work of salving the vessel, and that both of said salvors co-operated in performing the services and were interested in the reward.

Ninth. For that the court refused and omitted to find that libelants took advantage of the distress of the vessel's situation and of the apparent or real need of present assistance, and of the absence of other salvors, or means of salvage, to obtain a contract from the master for an excessive and exorbitant compensation; and that accordingly the said contract was not obtained in good conscience, and ought to be avoided and set aside, and salvage compensation given on the basis of *quantum meruit*.

332 Tenth. For that the court refused and omitted to find that the master was wrongfully induced to sign the said contract

for an excessive compensation, by erroneous representations as to the probable future danger of the vessel from storm and shifting of sand, made by the libelants, or by others in their interest or behalf, upon whom the master was justified in relying for advice. That said contract was not his free and voluntary act, or that of the owners of the vessel, and should be disregarded and suitable compensation awarded for the services performed.

Eleventh. For that the court refused and omitted to find that said alleged contract was made upon mutual mistake of fact as to the seriousness of the vessel's condition, and the difficulty of moving her from the strand, and for this reason should be vacated and set aside.

Twelfth. For that the court refused and omitted to find that the qualified authority given to the master by the owners of the vessel was given upon imperfect and erroneous information furnished to them by the master, and without a true appreciation of the real situation or position of the vessel, and from want of information, and should not bind them or their vessel to the said contract, and that as soon as they learned the real situation they disaffirmed the contract, and offered to consent to a decree for suitable salvage compensation for the service actually performed.

Thirteenth. For that the court refused and omitted to find that the master failed to follow the instructions and authority of the owners to accept the sum of £1,580 sterling, only in case a lower amount was unobtainable, but, on the contrary, agreed to a contract in the said sum, without making any further or other efforts to obtain bids for a lower figure, and that, therefore, said contract was not made with the owners' authority.

333 Fourteenth. For that upon all the facts and circumstances of the case, the court omitted and refused to find that the alleged contract was for an exorbitant and excessive compensation, and ought to be set aside and disregarded, and an award made in such sum as the court might find to be a suitable and reasonable compensation, as and for a salvage service performed independently of contract.

Fifteenth. For that the court refused and omitted to find that in any event strict performance of the contract had not been made by the libelants, in that they had not removed the vessel from her stranded position by means of their appliances and apparatus alone, and with the aid of the steamer's engine and crew, as provided in the contract; but that, on the contrary, the salvors obtained and made use of further apparatus and appliances belonging to the ship, to which they were not by the contract entitled, namely, four of the steamer's winches and her capstan, and two of the steamer's anchors, with their chain cables.

Sixteenth. For that the court awarded a final decree against the libelants, for the sum of $20,000, upon said alleged contract, with interest and costs.

Seventeenth. For that the court refused and omitted to enter a

decree in favor of the libelants for salvage compensation on the basis of a *quantum meruit* only.

CONVERS & KIRLIN,
WILLIAM B. LOCKHART,
Proctors for Claimants, Appellants.

334 United States District Court, Eastern District of Texas.

CHARLES CLARKE and ROBERT P. CLARKE, Composing the Firm of Charles Clarke & Company, Libelants,
against
THE STEAMSHIP "ELFRIDA;" PYMAN, BELL & Co., Claimants.
} Supersedeas Order.

It appearing from the records of the court in this case, that the claimants above named have filed a stipulation to abide the decree, in the sum of $40,000, signed by themselves and M. Lasker and M. Ullman, sureties, and that said stipulation and sureties were duly approved by the court, and that said stipulation provides:

"That the stipulators undersigned are, and each of them is, bound in the sum of forty thousand dollars, conditioned that the claimant above named shall abide by and pay the money awarded by the final decree rendered in the cause by this court, or in case of appeal, by the appellate court,"

as will more fully appear by reference to said stipulation, and that the final decree of the district court, against which the claimants appeal, is for the sum of $22,000, with interest at 6 per cent. from the 18th day of October, 1894, together with costs:

Now, on motion of the claimants, and pursuant to rule 13 of the United States circuit court of appeals for the fifth circuit, it is

335 Ordered, that no further bond on appeal is required, and that the said stipulation to abide the decree, stand as a *supersedeas* bond on this appeal, with leave to the libelants, however, to re-examine the sureties, if desired, and if they are found to be unsatisfactory, the claimants shall furnish such other sureties thereon, or such further bond, as a further order of this court, or of the appellate court, may require.

November 25, 1895.

D. E. BRYANT,
U. S. District Judge.

United States Circuit Court of Appeals for the Fifth Circuit.

CHARLES CLARKE and ROBERT P. CLARKE, Composing the Firm of Charles Clarke & Co., Libelants,
against
THE STEAMSHIP "ELFRIDA;" PYMAN, BELL & Co., Claimants.
} Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States, by the Honorable David E. Bryant, United States district judge for the eastern district of Texas, to Robert Clarke and Charles Clarke, composing the firm of Charles Clarke & Co., Greeting:

Whereas, Pyman, Bell & Co., claimants of the steamship *Elfrida*, have appealed to the United States circuit court of appeals
336 for the fifth circuit, from the final decree rendered in the district court of the United States for the eastern district of Texas, made in your favor against said steamship *Elfrida*, and filed in the office of the clerk of said court, on or about the 29th day of October, 1895, and have filed an assignment of errors and obtained a supersedeas, as required by law, you are therefore hereby cited to appear before the United States circuit court of appeals, at the city of New Orleans, on or before the 25th day of December, 1895, to do and receive what may appertain to justice to be done in the premises.

Given under my hand this 25th day of November, 1895.

D. E. BRYANT,
District Judge.

[SEAL.]

SIRS: Take notice that an original petition of appeal, allowance of appeal, assignment of errors, supersedeas order and citation, of which the within are copies, was duly filed in the office of the clerk of this court on this 26th day of November, 1895.

Yours, &c.,

CONVERS & KIRLIN,
WM. B. LOCKHART,
Proctors for Respondents, &c.

To Jas. B. & Chas. J. Stubbs and Joseph H. Wilson, proctors for libelants.

Due service of a copy of the within, and of the foregoing notice, admitted this 26th day of November, 1895.

JAS. B. & CHAS. J. STUBBS AND
JOS. H. WILSON,
Proctors for Libelants

(Endorsements:) "A. D., No. 672. United States district court. Chas. Clarke and Rob't P. Clarke, composing the firm of Charles Clarke & Co., libelants, against The S. S. *Elfrida*, Pyman, Bell & Co., claimants. Petition of appeal, allowance of appeal, assignment of errors, supersedeas order, and citation. Convers & Kirlin, Wm. B. Lockhart, proctors for claimants, 5 Beekman St., New York, N. Y. Filed November 26th, 1895. C. Dart, clerk."

337 In the District Court of the United States for the Eastern District of Texas, at Galveston.

I, C. Dart, clerk of the district court of the United States for the eastern district of Texas, at Galveston, in the fifth circuit and district aforesaid, do hereby certify the foregoing to be a true and correct copy of the record, assignment of errors and all proceedings in cause No. 672 on the admiralty docket of said court, entitled Charles Clarke & Company *vs.* Steamship *Elfrida*, her tackle, apparel and furniture, as the same now appears on file and of record in my office.

To certify which, witness my hand and the seal of said court, at Galveston, in said district, this the 3d day of December, A. D. 1895.

C. DART,
Clerk U. S. District Court, E. D. T., at Galveston,
[SEAL.] By W. L. HANSCOM, *Deputy.*

338 *Proceedings in the United States Circuit Court of Appeals.*

Hearing and submission.

November term, 1895.

TUESDAY, *April* 28, 1896.

(*Extract from Minutes.*)

PYMAN, BELL & COMPANY, Claimants,
vs.
CHARLES CLARKE & COMPANY.

This cause was regularly called this day and submitted to the court, after argument by Mr. J. Parker Kerlin, for appellants, and by Mr. Charles J. Stubbs, for appellees.

Decree.

November term, 1896.

TUESDAY, *November* 17, 1896.

(*Extract from Minutes.*)

PYMAN, BELL & COMPANY, Claimants of Steamship "Elfrida,"
vs.
CHARLES CLARKE & COMPANY. } No. 458.

This cause came on to be heard on the transcript of the record from the district court of the United States for the eastern district of Texas and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said district court in this cause be, and the same is hereby reversed, and this cause remanded to said district court with instructions to enter a decree in favor of the libellants, Charles Clarke and Robert P. Clarke, com-

posing the firm of Charles Clarke & Company, and against the *libellants*, Pyman, Bell & Company, and their sureties on the release bond herein, M. Lasker and M. Ullman, for the sum of
339 ten thousand dollars, with interest thereon at the rate of six per centum per annum from the date of filing the original libel in said district court, to wit: October 24th, 1894, until paid, and for the costs of this cause in said district court.

It is further decreed that the appellees, Charles Clarke and Robert P. Clarke, be condemned to pay all the costs of the appeal, for which execution may be issued out of said district court.

And afterwards, to wit: on the 7th day of December, 1896, a petition for rehearing was filed in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Fifth Circuit.

PYMAN, BELL & Co., Claimants of the Steamship "Elfrida," Appellants,
vs.
CHARLES CLARKE and ROBERT P. CLARKE, Libellants and Appellees. } No. 458.

To the honorable the judges of the United States circuit court of appeals for the fifth circuit:

Charles Clarke and Robert P. Clarke, appellees in the above-entitled cause, present this their petition for a rehearing, and with respect ask that it be filed and granted, and they state the following grounds upon which the rehearing is prayed:

1. The contract for salvage service and compensation should have been enforced, as it was shown without conflict that the salvor did not take advantage of the situation to make an unreasonable bargain, and there was no evidence whatever of bad faith or fraud, and the Supreme Court of the United States and this court have held that such contracts will be enforced in admiralty where there has been a definite, distinct agreement, with ample time for the parties to consider what they were doing, and where the contract was considered by all at the time it was made to be fair and reasonable.

Post *vs.* Jones, 19 How., 150.

340 The Agnes I. Grace, 2 U. S. App., 323; 51 Fed., 959.

This is also the English rule.

Jones on Salvage, 99.

This was, in all its essential features, a land contract and should be treated like other voluntary, deliberate contracts for specific services. It was entered into openly and fairly in all respects, and there is no principle or authority upon which it should be disregarded, or a new contract made for the parties.

The master had nearly two weeks in which to arrange for the salvage of the vessel and was in communication by cable with his owners and acted under their instruction. When the vessel first

went ashore, appellees offered to rescue her for such compensation as the court of admiralty would allow. This was refused, and after she had been stranded for several days, at a distance of 1,000 feet or more from water of sufficient depth to float her, her master invited bids and accepted the lowest, after submitting it to his owners.

The opinion of the majority of the court indicated that there was little or no probability of the vessel becoming imbedded in the sand, or wrecked upon the shore in case of a storm. We respectfully urge that this is counter to the whole body of the evidence, including that of the master of the *Elfrida* himself, whose testimony upon this point was based upon his own personal knowledge and experience, as well as information derived from the pilots, Lloyd's agent and other persons who had no interest whatever in the salvage. As to the perilous condition of the vessel, her log is probably the most reliable and the best testimony, but this court seems not to have considered it. (R., 315, 318.) This shows the variations in wind and weather. A strong wind and sea having driven the ship over the jetties on October 6, on the 7th her cable chain and wire rope parted, and with their anchors, were lost, and she was driven further on the beach. On the 8th and 9th the wind was light and the sea smooth. On the 10th a strong southerly gale and high sea caused the ship to bump and strain heavily. This weather continued until the 13th, when it moderated, but on the 14th and 15th we find this entry: "Very strong S. E. gale and very high sea.
341 Ship fast on the ground." On the 16th the weather moderated and on the 17th was very fine, and on the latter day the vessel was pulled off, after several days' preparation. We ask the court to review this log.

It will be borne in mind that the reckless charges of fraud and undue influence that were made by appellants were utterly overthrown by the proof.

Insufficient importance seems to have been attached to the master's testimony (R., 257–'9, 260, '70, '71,) where it is shown that the pilots, underwriters' agent and others, all concurred in regarding the vessel's situation as perilous. The court say that the evidence showed that no iron steamer had been lost on that coast. McDonald testified to at least one total loss, and others to vessels having been broken up. (R., 142.)

Where the vessel stranded there was, at the time of trial, only two feet of water, the sand having banked up (R., 152.) The weather record shows that the wind attained a velocity of as high as thirty-three miles per hour during the time that the vessel was ashore. (R., 326.)

2. The property saved was of the value, as the master swore, of $110,000; it was insured for $90,000, so that the salvage contract allowed twenty-five per cent. or less of the property saved as compensation.

3. This court should not have considered the questions involved in this case as if it were a question of salvage alone, but should have determined whether or not the contract was freely and voluntarily made after ample opportunity for inquiry and deliberation, and

whether or not the amount agreed to be paid was grossly disproportionate to the value of the property saved, keeping in view the conditions and the probabilities existing at the time, and the fact that the contractors could have lost three weeks' time, with the expense and labor incident thereto, and have reaped no reward, if unsuccessful in taking the vessel off, although they might have moved her to within a few feet of deep water.

The master says: "I wired them (the owners) that there was every probability of a bank forming around the ship, which was my opinion," (and was also that of every person who testified in
342 the case, and the disinterested persons whom the master consulted.) He further swore, that the salvors had two tugs and two lighters (R., 274–307); that where she was grounded was six feet deep at the stem, and eight feet at the stern, and by pumping out the water ballast, her lowest draught would still have been nine feet. In other words, with ballast out she would have still been three feet in the sand at the bow, and one at the stern. (R., 306.)

4. The amount decreed by the court below should not have been reduced, as it necessarily largely rested upon the credibility of the witnesses, and nearly all of them were before the district judge, who saw and heard them testify and was in a better position to determine the weight and credence that should have been given the evidence, and unless the compensation was grossly exorbitant and excessive, it should not be disturbed.

5. The entire evidence disproves the charges of bad faith and unfairness made by appellants.

6. This court should not have charged any of the costs against appellees. There was no proof of a tender, or offer to pay $10,000, or any other amount, and in the absence of such specific offer all costs should follow the judgment. It imposes a great hardship upon appellees, whom the evidence does not show ever had an opportunity for a fair compromise or adjustment of the controversy.

7. The opinions at hand do not show an allowance of interest from October 18th, 1894, at the legal rate of 6 per cent. per annum, that being the date that some compensation was due and payable appellees.

8. In view of the fact that this court may have overlooked such items of evidence as we have indicated in this motion, and that the very great reduction made by the court necessarily condemns the contract as unfair, excessive and oppressive, we earnestly ask to be allowed a reargument of the cause. We further submit, with the utmost deference, that the views, enunciated in the opinion delivered by Judge Speer, greatly modify, if they do not overrule, at least one former decision of this court, and are certainly not in accord with the opinions of the United States Supreme Court, cited by Judge Pardee in the dissenting opinion.

343 For the foregoing reasons, appellees pray that the court will grant a rehearing of the cause on the questions herein respectfully submitted.

JAMES B. & CHARLES J. STUBBS AND
JOSEPH H. WILSON, *Proctors for Appellees.*

I hereby certify that, in my opinion, the foregoing application for a rehearing is well founded in law, and I further certify that it is not interposed for delay.

JAMES B. STUBBS,
Proctor for Appellees.

Endorsed: Filed December 7th, 1896. J. M. McKee, clerk.

Order Refusing Rehearing.

November term, 1896.

(*Extract from Minutes.*)

TUESDAY, *January* 26, 1897.

PYMAN, BELL & COMPANY, Claimants,
vs.
CHARLES CLARKE & COMPANY.

Ordered, that the petition for rehearing filed in this cause be, and the same is hereby denied.

Opinion of the Court.

United States Circuit Court of Appeals for the Fifth Circuit.

PYMAN, BELL & COMPANY, Claimants of the Steamship *Elfrida*, Appellants,
against
CHARLES CLARKE and ROBERT P. CLARKE, Libellants, Appellees. } No. 458.

Convers & Kirlin and William B. Lockhart, proctors for appellants. J. Parker Kirlin, advocate.

Joseph H. Wilson, James B. Stubbs, and Charles Stubbs, proctors for appellees. James B. Stubbs, advocate.

Before Pardee and McCormick, circuit judges, and Speer, district judge.

SPEER, district judge, delivering the opinion:

The *Elfrida* was in ballast, bound for the port of Velasco,
344 Texas. This was on the 5th of October, 1895. The *Elfrida* is a British steamship of 1,454 tons net register, 290 feet long, 38 feet beam, and 20 feet 1 inch in depth. Velasco is a Texas port, a few miles from the mouth of the Brazos river. In order to increase the depth of water at the mouth of the Brazos, with the consent of the Government of the United States, a corporation has constructed jetties extending from either bank of the river about a mile out into the waters of the Gulf and the outer ends of the jetties for a distance of about two thousand feet are submerged. In the afternoon of the date above mentioned, the *Elfrida* was pursuing her way up the channel in charge of a duly licensed pilot. She had the advantage

of a moderate sea, but there was only five inches between the bottom of the vessel and the bottom of the channel. She was in about mid-channel when she suddenly grounded aft, and the wind on her starboard brought her bow up on the submerged western breakwater. The master of the *Elfrida* at once ran out a kedge anchor from the starboard bow and hove taut the line thereto with windlass, the engines going full speed, but could not move the ship. This effort was made with the obvious purpose to haul the bow of the *Elfrida* away from the jetty, but it resulted unfortunately, for the effect of the easterly wind and rising sea swung the steamship broadside to the jetty. On the next day the weather having slightly moderated, the master of the *Elfrida* put out the starboard bow anchor with fifty fathoms of cable, and again hauling the cable taut, waited until high water. This came at about 8 p. m., when the distressed master, after heaving on the anchor and working the engines according to his best judgment, finally concluded to pump the water ballast out of the number three tank, when the ship thus lightened, drifted over the jetty and grounded on the landward side. He then let go the port anchor to prevent her from driving further ashore. On the next day the cable chain parted and the ship drifted further toward the beach. The wire rope aft also parted, and the anchors were, for the time, lost. From that time until the ship was floated, while there was some variation in the weather, nothing actually occurred which increased her danger. An examination of the ship after she was hauled off indicated that she had not been materially injured. At 7.30 p. m., on the 17th day of October, the *Elfrida* was floated and proceeded to sea under her own steam to await daylight, so that she might safely enter the river. The manner of her rescue and the amount of compensation which should properly be awarded the salvors therefor occasioned a controversy which caused a libel *in rem* against her to be filed in the district court for the eastern district of Texas. The owners, Pyman, Bell & Company, of Newcastle-upon-Tyne, claimed the *Elfrida* and resisted the proceedings. On the trial, the district court rendered a decree for $22,000 and costs against the vessel and the sureties on the bond by means of which she had been released from the custody of the marshal, and from this decree the claimants entered an appeal to this court. The appellants filed numerous assignments of error, but a majority of the court think that the cause may be tried without specific reference to each and all of these.

Definition and analysis of the law controlling the amount of the award in a case of salvage has been frequently made. In addition to its own paramount definition, much eminent authority upon this topic is cited by the Supreme Court of the United States, in the case of Cope *vs.* Valette Dry Dock Company, 119 U. S. p. 628; but perhaps the statement which is the most comprehensive is that given by Sir William R. Kennedy, one of the judges of the Queen's Bench division, in his recent work, "The Law of Civil Salvage:" "Some circumstances are always material for consideration, and these have been ascertained by experience, and the court has for its guidance a long course of judicial decisions to assist it in coming to a proper

conclusion in each particular case. These material circumstances which Dr. Lushington, in his judgment in the *Charlotte*, 3 Wm. Robinson, 68–71, calls 'the many and divers ingredients of the salvage service,' it is necessary now to consider in detail. These may be classified as follows:

(*A.*) As regards the thing salved.

1. The degree of danger to human life.
2. The degree of danger to property.
3. The value of the property salved.

346 (*B.*) As regards the salvor.

4. The degree of danger to human life.
5. Their skill and conduct.
6. The value of the property employed in the salvage service.
7. The danger to which the property is exposed.
8. The time and labor expended in the performance of the salvage service.
9. Responsibilities incurred in the performance of the salvage service, such, *e. g.*, as risk to the insurance and liability to passengers or freighters through deviation or delay.
10. A loss or expense incurred in the performance of the salvage service, such, *e. g.*, as detention, loss of profitable trade, or repair of damage caused to ships, boats or gear."

Under this subdivision, Mr. Justice Kennedy makes an observation similar to that made by the Supreme Court in the case of Cope *vs.* Dry Dock (*supra*), as follows:

"Where all or many of these elements are found to exist, or some of them are found to exist in a high degree, a large reward is given; where few of them are found, or where they are present in a low degree, the salvage remuneration is comparatively small." Kennedy, Civil Salvage, 119.

It is to be observed in this enumeration that the ingredient of first importance both as regards the thing salved and as regards the salvor is the degree of danger to human life. This was also announced by Lord Stowell, of whom a biographer has stated, that "The illustrious civilian must have possessed such a practical knowledge of shipping affairs as was probably never before attained by an advocate in the courts which he frequented." He had been born and bred in a seaboard town, Newcastle-upon-Tyne, which it is interesting to observe is the town of the appellants here, and his father like them had been actively engaged in its shipping interests, and he himself after his father's death carried these on. "What enhances," he declared, "the pretensions of the salvors most, is the actual danger which they have incurred. The value of human life is that which is and ought to be principally considered in the preservation of other men's property; and if this is shown

347 to have been hazarded, it is most highly estimated." The *William Beckford*, 3 Christopher Robinson, 355–358. See also the opinion of Sir John Nichol in the *Clifton*, 3 Haggard, 117–121. The most recent expression in the high court of appeal by Lord Justice Lindsley, in the case of the *City of Chester*, 9 Probate Division, 182–202, in no degree departs from the opinion of

Lord Stowell above quoted. Said Lord Lindsley: "The first matter of consideration is the nature of the service rendered, the dangers from which the one ship has been saved, and the danger to which the other ship has been exposed. Under this head have to be considered the skill and courage of the salvors, and the risk of life and death as well to the saved as to the rescuers. A salvage service which hardly exceeds ordinary towage is naturally remunerated on a very different scale from a heroic rescue from imminent destruction." Critical scrutiny of the record of this cause will fail, we think, to discover any danger to the lives of the officers and crew of the *Elfrida*, or of persons engaged in floating her. The weather, while the ship was stranded, was moderate and most of the time fine. There was always communication with the shore by means of a small boat. Indeed, it is not suggested that there was any danger to the life of anybody concerned. Said Dr. Lushington, in the case of the *Thomas Fielding*, 32 Law Journal Admiralty, 61–'2: "However great may be the danger to the property itself, if it is wholly unattended with the risk to human life, it assumes much less value than when under circumstances where human life is put in peril." It follows, therefore, that the first and most important element which might otherwise "enhance the pretensions" of the salvors was wholly absent.

We will next inquire: First, what was the present, and secondly, what the probable future danger of the *Elfrida* herself. Most important perhaps in this connection was the state of the weather. We have stated, and it may be seen from the testimony of the master and many witnesses, the weather was moderate and often fine during the entire period that the *Elfrida* was aground. Great importance in this connection should be attached to the official weather report which was in evidence. From this record,
348 kept under the authority of law, it appears that the wind was blowing off shore during the time the vessel was on the beach, except on the afternoon of the 9th of October, and on the 10th, 11th, 12th, 15th, 16th and 17th. The maximum velocity of the wind while the vessel was on the beach was twenty-eight miles on the 8th of October, but since the direction of the wind at that time was from the north, it was off shore, and could not affect her. While blowing on shore the maximum velocity was fourteen miles an hour and the minimum three miles. It was clear all the while. An important feature is the testimony of Hutchins, a witness for libellant, who had been superintendent of the life-saving station on the gulf of Mexico for thirteen years. He testifies that the shore where the vessel stranded is very flat, sloping out gradually. A depth of nine feet of water would not be reached inside of twelve hundred feet from the shore, and a depth of fourteen or fifteen feet could not be attained at less than three-quarters of a mile. The breakers, he testifies, are in twelve or sixteen feet of water, but only the spent force of the waves flows from that point upon the beach. Since the steamship was in nine feet of water at high tide, it is plain that she was well inside the line where the force of the waves in the usual weather of that period of the year could have affected her

with serious results. She was directly head on to the shore. She was erect, and lay easily in the bed she had made for herself in the quicksand which, on that coast, unlike the sands of the Atlantic seaboard, had a tough clay foundation. The tides could not have produced any material effect on her condition. We have the valuable assistance of the tide record produced and verified by the testimony of Lieut. Judson, of the corps of engineers, U. S. A. This was taken at Galveston, which differs little from those at Velasco, forty miles away. The rise of the tide during the time the *Elfrida* was ashore was from two feet nine inches up to three feet three inches and down to two feet. It is expressly admitted in the amended libel that the vessel was lying in about nine feet water at the highest point of high tide. The *Elfrida* was at no time seriously imbedded in the sand, and the ease and rapidity with which
349 she was drawn off into deep water by the power of her own engines, attached with hawsers to anchors which were put out by salvors, would seem to indicate that had she herself the facilities for putting out her own anchors, she might have been floated without any assistance whatever. It is true that a dangerous storm from the southward was possible, but the official records kept at Galveston indicate that for the past twenty years the prevailing direction of the wind in the month of October was southeast, with an average velocity of only ten miles an hour, and for the months of November and December the prevailing direction of the wind was from the north, and the average velocity nine or ten miles. Further it appears from the testimony of Hutchins, superintendent of the life-saving station, who was, perhaps, the most experienced observer introduced by the libellants, that during the thirteen years of his experience on that coast he had never known of an iron steamer which was stranded and lost. One at a point two hundred and fifty miles from Galveston had been somewhat injured, but was rescued in eleven days. On the whole it appears from the character of the bottom, the smooth waters and gentle winds which are to be expected in that soft climate in a month notable for its mildness, that the *Elfrida* was in little danger. The witness Smith, who testified for the libellant, stated with regard to that locality: "You can almost take anything off the beach; the question is whether it is worth it." Many of the witnesses testified that vessels ashore on the Texas coast work their way around in different directions for considerable distances, and are finally rescued. One witness Smith testified that it was much better for the vessel that she should be on the ground, because then she would not thump and hurt herself. "The way we do," he said, "when they begin to go aground, is to pump full their ballast tanks at once, so as to make them lie steady. When they lay in the bed of sand they are better off than if they were rising up and down and striking the bottom." The *Elfrida* aground had two feet less of water at her bow than at her stern, and in pulling her down the gradual incline to deep water it was as if she was sliding down hill.

Again, the amount of skill exerted by the salvors was
350 nothing uncommon or extraordinary. A small schooner in tow of a tugboat conveyed the salvage equipment from Gal-

veston to Velasco. In quiet waters at Velasco the anchors were transferred from the schooner to a barge, and from the barge were planted on the steamer's starboard quarter. The anchors of the *Elfrida* were planted on the port quarter, and the fifth anchor on the starboard side. Ropes and cables were attached to the chain cables and carried aboard the *Elfrida*, and each cable was attached to the drum of two winches, and as we have seen the *Elfrida's* engines and steam, straining on the cables for about four hours, hauled her over the sands to deep water. Nor was the value of the equipment used by the salvors of especial importance. A small schooner chartered to take the anchors from Galveston to Velasco for the sum of one hundred dollars, a barge said to be worth about six thousand five hundred is about all of this plant concerning which there is definite evidence. The value of the anchors and cables used by the salvors is not given. There were fifteen or sixteen men employed, and as we have seen there was no unusual danger to either life or property, and the time and labor expended, including everything that was done from the 13th, when the salvors began their preparations in Galveston, until half past seven o'clock on the 16th, was only three days. At the hour last mentioned, the *Elfrida* was afloat and proceeded to sea under her own steam. The actual time engaged in hauling her off the sand was about four hours. There was little responsibility and no loss or expense other than that necessarily implied from the work of the salvors heretofore stated. It further appears from the evidence that in other respects the condition of the *Elfrida* was by no means unfavorable. She was only lightly aground, and at high-water mark her stern was afloat. By discharging her water ballast and coal, it is plain she might have lightened her draught so that she would not be aground, or if aground at all, she would be resting very lightly on quicksand. She had sustained no injury. Her machinery, while strained, was in good working order and possessed all its power. In a large measure the jetties protected her from easterly winds.

Had the winds blown from the north, it would have been dis-
351 tinctly favorable, and had they worn around to the south-
ward, scarcely less so. For at that season, the evidence strongly indicates that severe winds were not experienced from southerly points. The official local forecast at Galveston for twenty years was in evidence, and it shows that the prevalent winds in the month of October were from the southeast, with an average velocity of only ten miles an hour, and during the same period, in the months of November and December, the winds were from the north with an average hourly velocity of nine and ten miles respectively. Indeed, it is rarely the case that so many favorable conditions attend a vessel which needed salvage service. A. Covenney, the pilot, whose testimony, while offered for claimants, was strongly colored for the salvors, nevertheless stated that had the vessel been supplied with suitable anchors and cables he could probably have gotten her off with such a tide. This is besides plainly apparent from the ease with which the libellants floated her with no other power than that afforded by her own engines. Her value was about seventy

thousand dollars. It is contended by the appellees with great earnestness and ability, on the part of their learned advocate, in this case there was a definite agreement for salvage compensation and that the court should not disturb it, although it may exceed the amount of what would otherwise be deemed as proper compensation, and the case of the *Agnes I. Grace*, 51 Fed. Rep. 959, and 2 U. S. App. 317, and other authorities are cited in support of this proposition. The language of Dr. Lushington as quoted in the case mentioned is as follows: "When there has been a definite and distinct agreement with ample time for the parties to consider what they are doing, the court would be reluctant to interfere with it." This principle is otherwise expressed by the Supreme Court of the United States in Post *vs.* Jones, 19 Howard, 150: "Courts of admiralty will enforce a contract made for salvage service and salvage compensation where the salvor has not taken advantage of his power to make an unreasonable bargain." While this is true, there is abundant authority for courts of admiralty to exercise the power of setting aside agreements for excessive compensation on account of salvage services. This prin-
352 ciple was ascertained and clearly expressed very early in the evolution of the law. The small island of Oleron off the west coast of France, the Uliarus Insula of Pliny, gave its name to the medieval code of sea laws described in the Black Book of the Admiralty as the Laws of Oleron. The earliest text extant is in the handwriting of the fourteenth century, and is contained in the Liber Memorandum of the Corporation of the City of London, and is preserved in the archives of their Guildhall. Judicial historians have stated that Richard Cœur de Leon on his return from the Holy Land remained some time in the island of Oleron, and is entitled to the honor of producing these laws while there. It is, however, stated by Mr. Benedict in a note to his valuable work on admiralty that Pardessus has clearly shown that the laws of Oleron were not the production of Richard the First. It seems to be accepted now that Eleanor, duchess of Aquitaine and Guienne, consort of Louis VII of France, but subsequently divorced from him and married to Henry II of England, and who became the mother of the Lion Heart, having observed during her visit to the Holy Land in company with Louis that a similar collection of maritime customs and ordinances in the Catalan language called Lo Libre de Consulat, was generally respected in the Levant, directed that the judgments or the maritime court of the island of Oleron, at that time a peculiar court of the duchy of Guienne, should be made, that they might serve as law for the mariners of the neighboring seas. It is also accepted that Richard the First brought to England a roll of these judgments which he published and ordained to be observed as law. Encyclopedia Brittan-ica, article Sea Laws. This interesting mediæval compilation of maritime judgments announces this rule: "And yf it were so, that the mayster and the marchauntes have promised to folke, that shuld helpe them to save the shyp and the said goodes, the thyrde parte or half of the said goodes which shuld be saved for the peryll that they be in, the justyce of the

country ought well to regarde what payne and what labour they have done in saving them, and after that payne, notwithstanding that promise which the said mayster and the marchauntes shall have made, rewarde them. This is the judgment." The
353 principle of this sententious deliverance is universally accepted by the courts and announced by the text writers upon this topic. Of such contracts, it is stated in 2 Parsons Shipping and Admiralty, p. 306, that they are "enforced by the court only so far as it seems equitable and conformable to the merits of the case, and are wholly disregarded, if they are deemed unconscionable and oppressive to the owners of the property saved."

In Jones on Salvage, pp. 97, 98, it is said: "The court will also refuse to recognize an agreement where the master improperly or recklessly contracts to pay the salvors an exorbitant amount. * * * If, on the other hand, the agreement should be unjust or inequitable towards the salvors, the court will refuse to recognize it," and allow them adequate compensation.

In the *Phantom*, L. R. I. Adm. 58, Dr. Lushington, p. 61, said: "However much it has been agreed upon by both parties, the court is in the habit of overruling such an agreement, if it is unjust and inequitable." In his well-known work on Wreck and Salvage, section 119, Judge Marvin, who for many years presided in the district court of the United States at Key West, where numerous salvage cases were tried, uses this language: "And such an agreement will not be binding upon the master or owner of the property unless the court can clearly see that no advantage has been taken of the party's situation, and that the rate of compensation agreed upon is just and reasonable." And the illustrious Story in the *Emulous*, 1 Sum. 207, at pages 210, 211, declares that "No system of jurisprudence founded upon moral or religious, or even rational principles, could tolerate for a moment the doctrine that a salvor might avail himself of the calamities of others to force upon them a contract unjust, oppressive and exorbitant; that he might turn the price of safety into the price of ruin; that he might turn an act, demanded by Christian and public duty, into a traffic of profit, which would outrage human feelings and disgrace human justice." The principle is also adopted by the imperial government of Germany: "When during the danger an agreement has been made as to the amount of the salvage or payment for assistance, such
354 agreement may, nevertheless, be disputed on the plea that the amount agreed upon was excessive, and the reduction of the same to an amount more in accordance with the circumstances of the case may be demanded." German Commercial Code, art. 743. Translated in Wendt's Maritime Legislation (3d ed.), London, 1888, p. 751. See also the *Ellen Holgate*, 8 Federal Cases, p. 509. The Rialto probate division high court of appeal, England, 1891, Post *vs.* Jones, 19 Howard, 150.

In the case last quoted, the Supreme Court observes: "Courts of admiralty will enforce contracts made for salvage service and salvage compensation where the salvor has not taken advantage of his power to make an unreasonable bargain; but they will not tolerate

the doctrine that a salvor can take advantage of his situation and avail himself of the calamities of others to drive a bargain; nor will they permit the performance of a public duty to be turned into a traffic of profit. The general interests of commerce will be much better promoted by requiring the salvor to trust for compensation to the liberal recompense usually awarded by courts for such services."

Nor is it necessary to avoid such a contract that the owner should show such fraud or duress as would vitiate a contract at law. Sir William Kennedy, in his Law of Civil Salvage, p. 208, states: "It is not, however, it is submitted, only where it is proved that there has been unfair dealing in the shape of fraud, or misrepresentation, or practical compulsion, that the court will interfere with an agreement which fixes a grossly excessive remuneration. Evidence of any such unfair dealing greatly strengthens, of course, the case against the agreement, but even without such evidence if it finds the exorbitancy to exist, however that exorbitancy originated, the court will, alike on principle and authority, be justified in setting aside the agreement." Indeed, the jurisdiction of a court of admiralty to set aside an excessive salvage contract was exercised, as we have seen, in the time of Richard the First, and it does not appear that contracts and other instruments were cancelled by the courts of chancery before the reign of Henry VI, two and
355 one-half centuries later. I. Spence Equitable Jurisprudence of the Court of Chancery (Philadelphia, 1846), p. 624.

We conclude, therefore, that the learned district judge was in error when he became of the opinion that he could not set aside the agreement for salvage except upon such evidence as would justify a court of equity in relieving a party from the obligation of a contract.

There remains to be determined, whether the award of the circuit court should be reduced because the amount stipulated as compensation for salvage in the contract and allowed by the final decree is unreasonable, excessive and oppressive. We have seen that the salvage services were neither onerous, arduous, responsible, dangerous or unusually skilful, or long of duration. Nor was the master, when he agreed to pay the enormous sum of $22,000 for relief of his vessel, on an equal footing with the experienced salvor, Clarke, who made the contract. Clarke was perfectly familiar with the coast. He knew the dangers and opportunities of success. His experience was great. He had never failed to float a ship on that coast. The master was a young and inexperienced man, only twenty-eight years of age. The locality was unknown to him; and how his excitement, anxiety and inexperience would enhance to him the dangers of the situation, may be readily understood. He was informed by Clarke that sand would bank around his ship, and this did not appear to be true. It was made to appear to the master that Clarke and he only had the equipment for hauling the ship off. The danger of the *Elfrida* was greatly exaggerated. It is true that Clarke had originally offered to perform the service for what a court of admiralty would allow him, but we can well understand how alarming this proposition would be to the young master of the ship.

The mention of litigation is terrible to a seaman, and the proposition was declined. But Clarke afterwards positively refused to render any assistance to the ship except upon a contract to pay $22,000 for the service, and Brock, who it seems owned the barge, gave the same refusal. The Galveston Lighterage Company was asked by the ship's agent if they would send tugs and appliances to Velasco to assist the ship, and after consultation they refused. To the master it must have
356 seemed that if he failed to secure Clarke, his vessel was inevitably lost, and yet it is probable that he might have secured a lighter, planted his own anchors, and pulled his vessel off by the use of her engines, without any assistance from Clarke whatever. The owners of the ship also were ignorant of the true condition. The master was gravely in error when he failed to advise them that a tender had been made to perform the services for such a sum as the admiralty court would allow. It is clear that they would have accepted this proposition. They accepted the contract with the understanding that they had no other option, and it may be seen how desperate they regarded the condition of their vessel, when they insisted that the salvors should take the vessel itself in certain contingencies. They testified that if they had known that she was lying easily head on to the beach with little or no accumulation of sand about her, with a depth of water only a foot less than her draught would have been with her ballast tanks empty, with fine weather, likely to continue, with no immediate danger probable, they would never have authorized the agreement for a sum so unconscionable. There are many cases where for much greater services and on much greater values and with much more of difficulty and danger to the salvors, a less sum has been allowed by the court. Perhaps the most pertinent of these is the *Hesper*, 18 Fed. Rep. 696, decided in this circuit by the distinguished senior circuit judge, whose scientific and practical training in the naval service, supplemented by his great experience in such causes, makes his conclusions of great value. See also the *Guadalope*, 20 Fed. Rep. 443; Pent *vs.* Ocean Belle, 19 Fed. Cases, 200; the *Diadem*, 7 Fed. Cases, 632; the *North Erin*, 71 Fed. Rep. 430. Much reliance is placed by counsel for appellee upon the case of the *Agnes I. Grace*, 2 U. S. App. 323. In that case, however, the ship in distress was a sailing vessel. She had at high water passed over shoals for more than two miles, where at low water the depth is only from one to three feet. She was exposed to the full force of the Atlantic. She was in quicksand on a coast where it is universally true that a vessel so situated rapidly sinks out of sight. The case of the United States steam-
357 ship *Huron* off Kitty Hawk, and the ocean steamship vessel *City of Savannah* ashore off Hilton Head, in their rapid disappearance from sight, are instances of the treacherous and dangerous character of the Atlantic quicksands. Besides, the *Grace* was two and a half or three feet in the sand, a hole had been knocked in her bottom. The tide rose and fell in her hold. She was rapidly filling with sand. The salvors were engaged for several days in very dangerous work, both to themselves and very valuable tug-

boats in the successful attempt to rescue her, and she was so damaged that it was only by the rapid and constant work of a powerful wrecking pump she was kept afloat at all. The value of the tugs and other equipments seriously jeopardized in her recovery *were* very much greater than the meager equipment used in the rescue of the *Elfrida*. The case, therefore, is in no sense parallel to that before the court.

For the reasons stated, a majority of the court are of opinion that the decree of the district court should be reversed and set aside, and we find that a decree should be entered for the appellees for the sum of $10,000, which sum, in view of all the facts, we regard as ample compensation for the salvage services rendered. We further find that the appellants shall pay the costs of the court below, and the appellees the cost of the appeal.

It will be so ordered.

PARDEE, circuit judge, dissenting:

I do not discover that the nature and origin of the admiralty jurisdiction in salvage cases, or the general principles upon which admiralty courts make salvage awards, are involved in this cause. The question is in regard to the enforcement of an admitted salvage contract, and as declared by the Supreme Court in Post *vs.* Jones, 19 How. 150, 160, the law in that behalf undoubtedly is:

"Courts of admiralty will enforce contracts made for salvage service and salvage compensation, where the salvor has not taken advantage of his power to make an unreasonable bargain; but they will not tolerate the doctrine that a salvor can take the advantage of his situation, and avail himself of the calamities of others
358 to drive a bargain; nor will they permit the performance of a public duty to be turned into a traffic of profit."

Our inquiry should be, to wit: As the circumstances were at the time the contract was entered into between the owners and salvors of the *Elfrida*, did the salvors take advantage of their power to make an unreasonable bargain, or in other words, was the amount of salvage contracted for excessive in proportion to the value of the property salved, to such an extent as to be unreasonable? "The Agnes I. Grace," 2 U. S. App., 317.

The *Elfrida* was aground within the limits of the port of Galveston and off the harbor of Velasco, upon a sandy beach in water from six to eight feet in depth according to the tides, one thousand feet distant from water of sufficient depth to float her, embedded in sand about two feet, with a draft of eleven feet ten inches, which could not be reduced by discharge of ballast or otherwise, so as to get her off. The master had ineffectually attempted to pull the ship off with the aid of her own anchors, cable, gear and a tugboat, but had lost an anchor and a cable, and had strained the ship's appliances, and the ship was practically helpless for ten days before the contract for salvage was entered into. From the time the ship went ashore the master was in communication with the agents of the ship and Lloyd's agent in the interest of the underwriters in Galveston—all practically on the ground—and by cable

with the ship's owners. Before the contract for salvage was entered into the master had opportunities to acquaint himself with the nature of the shore upon which he was stranded, and the surroundings and conditions, as well as the likelihood of the ship's being damaged or lost; and beside the agents and owners above mentioned the master had information and advices from pilots and masters of other vessels at Velasco in nowise concerned with or for the contracting salvors.

During this time the libellants in the court below, and the appellees in this court, offered to the captain to undertake the floating of the *Elfrida* for such salvage compensation as the United States court would award if they were successful. This proposition the master refused and, instead, under the advice of his agents, called for tenders as follows:

359 "Please tender for to float and place in a place of safety, say Galveston, where her bottom can be examined, furnishing diver and his apparatus, also to furnish all material and labor in floating said S. S. *Elfrida*, also time required. Reply at your earliest convenience under seal to James Sorley, Lloyd's agent, or myself. No cure no pay.

Yours truly, B. BURGESS, *Master.*

P. S.—A convenient time to be allowed to get the ship off, and if at the expiration of the time the vessel is still aground, all claims on this contract to cease and to be null and void.

B. BURGESS, *Master.*"

How many of these tenders were sent out does not appear, but the master in response received two propositions, one for the sum of $24,000 and one for $22,000. He cabled the lower proposition to his owners and received instructions as follows:

"To Burgess, steamer *Elfrida*, Velasco:

Accept tender forty-five eighty, if lower impossible. No cure no pay. Try include in agreement if steamer after coming off not worth amount salvage, steamer in damaged state to be taken in payment salvage.

PYMAN."

Under this instruction he entered into a contract with the appellees by which they bound themselves to float and place in a safe anchorage, Quintana or Galveston, as directed, the steamship *Elfrida*, furnish all labor and material at their own cost, furnish diver and necessary apparatus to survey and examine the bottom of said steamship and complete the same within twenty-one days, otherwise no compensation for work performed, labor, tools, or appliances furnished. The master agreed to pay for such services the sum of $22,000, but reserved the right to abandon the ship in favor of the salvors in lieu of the said $22,000. At that time, according to the evidence, all parties thought the matter of floating the *Elfrida* would be a difficult and tedious work, necessarily taking time and accompanied with great risk of success. That the master

and owners so believed is shown by the fact that they required the salvors to do the work in twenty-one days, and stipulated for the option to abandon the ship in lieu of paying the salvage
360 agreed upon; and that the contractors so believed is shown by the extensive preparation made to carry out their contract. The contracting salvors prepared a month's supply for their force, procured cables, gear, chains, anchors, two tugboats, two lighters and two schooners, fully manned and equipped, and hired a large force of men. Some of the anchors and chains and the tugboats were the property of the contractors, but the schooners and lighters and other anchors and chains were hired. As to one lighter, at least, the contractors specially assumed the responsibility of all loss. The property thus prepared was worth about $50,000, was exposed to risk of loss or damage in the Gulf and by contact with the jetties and with and near the *Elfrida* among the breakers. About five and one-half days were consumed in preparations and actual work. By means of the skill and experience of the salvors, with favoring weather, the *Elfrida* was floated. When afloat, she was worth, according to the evidence, from ninety to one hundred and ten thousand dollars. The only possible ground upon which the amount of the salvage contracted for can be claimed to be excessive, is because of the signal success of the salvors within the short time employed. The charges so recklessly made by the claimants in the court below as to collusion, fraud, overreaching, bad faith and misrepresentation generally, are wholly unsupported by proof. The pretense that the master or owners were coerced into making the contract is absurd, in view of the fact that Clarke & Co. offered to undertake the salvage without any contract and for such award as the United States court might make. The amount agreed upon was not excessive, on the contrary, was low, from the outlook before and at the time the contract was made. Since the successful rendition of the salvage services, in view of the preparations to that end, the extraordinary risks the contracting salvors were compelled to assume, the skill and experience employed, and the very important fact that the amount agreed upon does not exceed twenty or twenty-five per cent. of the salved property, I am clearly of opinion that the amount agreed upon is not excessive to any such extent as to be unreasonable.

The judge of the district court found "from the evidence
361 that said contract was a lawful contract, and that the same was entered into by the said master of said steamship with full knowledge or means of knowledge of the said master and of the owners of said steamship of all the conditions then existing, and that the amount named in said contract was not unreasonable under the said conditions."

The judge evidently had read with appreciation "The Agnes I. Grace," 49 F. R., 662, decided in the United States district court, at Savannah, and he evidently attempted to follow the opinion of this court in the same case on appeal, "Agnes I. Grace," 2 U. S. App., *supra*. In my opinion he decided the case correctly.

How the discretion vested in the courts in matters of salvage con-

tracts has heretofore been exercised by distinguished admiralty judges appears from the following extracts:

Mr. Justice Story, in Bearse *vs.* Pigs of Copper, 1 Story, 323, says:

"The situation of the parties, the nature of the service, and the absence of all controlling necessities, requiring immediate relief, on one side, at any expense and hazard, in order to escape from impending perils and calamities; and on the other side, the absence of any duty to lend the required assistance, or any motive to take advantage of the necessities and urgencies of those perils and calamities, to drive a hard and unconscionable bargain; these circumstances make it a case where the court not only looks with indulgence upon such a contract, but endeavors to fortify itself against the exercise of mere discretion, by adopting and enforcing such a contract as equally just, moral and conscientious."

Judge Brown, of the southern district of New York, in "The Alert," 56 F. R., 721, 724, says:

"In such contracts, so far as the element of a reward enters into the compensation allowed, that is, an allowance wholly beyond the mere *quantum meruit* for the work and labor performed, as a reward given as a premium, on grounds of public policy to encourage the maintenance of salvage equipments and to induce speedy and heroic efforts for the safety of life and property—this element can-
362 not logically become a subject of barter, or of any irreviewable contract between the parties; since that would permit the parties to usurp *pro tanto* the functions of the court.

"But these considerations are applicable but slightly if at all to contracts, which, like the present, are made upon land, between parties dealing upon equal terms, with full opportunity for deliberation, with equal knowledge of the facts, and under the ordinary conditions of non-maritime contracts. Such contracts should be treated like other voluntary, deliberate contracts for a specific service. Bondies *vs.* Sherwood, 22 How. 214; 'The Agnes I. Grace,' 2 C. C. A. 581; 51 F. R. 959."

Judge Longyear of the district of Michigan, in "The Silver Spray," 1 Brown Ad. 354, says:

"As the matter turned out, it was no doubt a hard bargain for the libellants. But I do not understand that a court of admiralty will set aside a contract for that cause alone, where it is free from all fraud, deception, mistake or circumstances of controlling necessity.

"McArthur had ample time for consideration, and there is no pretense of any fraud or deception on the part of Moore or his agent, Reilly, or that McArthur did not know all about the situation, and the difficulties in the way of getting the boilers out, and there was no controlling necessity, of duty or otherwise, to undertake the job. The contract appears to have been entered into openly and fairly in all respects, and there is no principle or authority upon which the court can disregard it, or make a new contract for the parties.

Judge Hughes of the eastern district of Virginia in "The Sir William Armstrong," 53 F. R. 150, says:

"It is well settled text-book law that the master of a vessel in distress may bind the owner by a salvage agreement in the absence of

the owner; that it is competent for salvors, instead of leaving the amount of their remuneration to be determined by a court, to agree with the master of a vessel in distress to render the required assistance for a specific sum; and that, if a salvage agreement be proved, the court will enforce it, unless it be clearly inequitable; it being no answer to an agreement to say, on one hand, that it is too
363 hard upon the salvors, or, on the other, that the salvage services were attended by less difficulty than was anticipated."

Judge Wells of the district court of Missouri, in "H. D. Bacon," 1 Newberry, 280, says:

"The true principle by which such cases should be governed, would appear to this court, with great respect for others, to be that established in like cases in courts of equity; that is, that a contract should be presumed *prima facie* to be fair, but if proven to be unconscionable, the court of admiralty, like the court of equity, would refuse to enforce it."

Judge Speer, of the southern district of Georgia, in "The Agnes I. Grace," 49 F. R. 664 (where $5\frac{5}{12}$ of the salved property was awarded as salvage), says:

"It is true, as is insisted by the respondent's counsel, that a contract of this character is not binding upon the court, and that in all cases of salvage it is competent for the court to adjudge and assess the amount of the recovery in accordance with the equities of the case; and, if it should appear that a contract of this character was an inequitable one, the court would, of course, disregard it. But whenever a contract has been entered into, after due deliberation by the parties, and has not been shown to be in any respect an inequitable one, is is exceedingly valuable as evidence to enable the court to arrive at a just determination. The court regards this contract as evidence in that light, and not as a conclusive contract; but it is a most significant and valuable indication of what should be the true amount of recovery."

In Jones on Salvage (p. 99), the English rule is declared as follows:

"If a salvage agreement be proved, the court will uphold it, unless it be clearly inequitable; and it is no answer to the agreement to say that the bargain is a hard one upon the salvors; or that greater difficulties than were anticipated, in consequence of the change of weather, attended its performance; or that the weather became tempestuous; or the vessel was longer in arriving in port that might have reasonably been expected. Nor, on the other hand, can the owner of the vessel receiving assistance refuse to pay
364 the amount stipulated for, on the ground that the salvage services were attended with less difficulty than had been anticipated, unless, indeed, the sum happen to be so grossly exorbitant as to amount to evidence of bad faith or fraud, which, of themselves, would induce the court to set aside the agreement."

In "The Agnes I. Grace," 2 U. S. App., *supra*, this court held that:

"Courts of admiralty will enforce contracts for salvage services and salvage compensation where there has been a definite, distinct

agreement, with ample time for the parties to consider what they were doing, where the contract was considered by all at the time it was made to be fair and reasonable, and where the salvor did not take advantage of his power to make an unreasonable bargain."

If the rule unanimously declared by this court in the last-cited case is applied to the case in hand, the decree appealed from must be affirmed. A reversal of that decree, and a reduction of the amount of salvage stipulated in the contract necessarily stamp the salvors with fraud and bad faith, and this, in my opinion, is wholly unwarranted by the evidence and circumstances of the case.

I have examined the adjudged cases cited in the opinion of the court as supporting the doctrine that a salvage contract may be disregarded under any and all circumstances when the court is inclined to think the amount of compensation agreed upon is too much or too little, to wit: "The Phantom," L. R., 1 A. and E.; "The Emulous," 1 Sumner, 207; "The Ellen Holgate," 8 Fed. Cases, 509; "The Rialto," L. R., Prob. Div. 1891; Post *vs.* Jones, *supra*, and I find that while detached expressions in the opinions rendered may apparently support the contention of my brethren, not one of the cases referred to warrants the abrogation of the salvage contract in the instant case unless bad faith and undue advantage are imputed to the contracting salvors; and in Post *vs.* Jones, *supra*, the Supreme Court of the United States, whose decisions ought to be of controlling influence in this court, expressly declared that "courts of admiralty will enforce contracts made for salvage service and salvage compensation where the salvor has not taken advantage of his power to make an unreasonable bargain."

In the present case it is undisputed that the contracting
365 salvors offered to do the work, leaving the compensation to be settled by a court of admiralty, and that the master on shore surrounded by his friends and in full communication with the world by rail and telegraph, in consultation with owners, and having every opportunity to inform himself as to the circumstances, called for competing bids, received more than one, and accepted the lowest in a contract which fully protected the owners and threw all the risks on the salvors with a time limit. It is an overdraft on my credulity to ask me to take the evidence in the record, and conclude that when the contract of salvage was entered into, there was either undue advantage taken of power, collusion or bad faith on the part of the salvors, or that the bargain made was unreasonable.

United States Circuit Court of Appeals for the Fifth Circuit.

I, J. M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing 366 pages, numbered from *a* to 365, inclusive, contain a true copy of the record, pleas, process and proceedings in the case of Pyman, Bell & Company, claimants of steamship "Elfrida," appellants, *vs.* Charles Clarke & Company, appellees, No. 458, as the same remains upon the files and records of said United States circuit court of appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this 4th day of February, A. D. 1897.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

J. M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

366 Supreme Court of the United States.

CHARLES CLARKE and ROBERT P. CLARKE, Libelants and Appellants,
vs.
STEAMSHIP "ELFRIDA;" PYMAN, BELL & Co., Claimants and Appellees.

It is hereby agreed by and between the parties to the above cause, acting herein by their respective counsel, that the writ of certiorari granted by the honorable Supreme Court of the United States upon the application of the libelants in above-entitled cause may be answered and complied with by the hon. United States circuit court of appeals for the fifth circuit, through its proper officer, by referring to the transcripts in said cause already on file in the office of the clerk of the Supreme Court of the United States, at Washington.

And it is agreed that such transcript so on file in the office of the clerk of the Supreme Court shall be considered and taken as the true and full transcript of all the proceedings in the district court and circuit court of appeals for the purpose of the determination of the cause by the Supreme Court, and the clerk of the circuit court of appeals need not send up any other or further transcript in obedience to the writ.

March 20, 1897.

JAMES B. & CHARLES J. STUBBS,
JOSEPH H. WILSON &
HENRY M. EARLE,
Counsel for Libelants.
WM. B. LOCKHART &
CONVERS & KIRLIN,
Proctors for Cl'ts, App'ees.
J. PARKER KIRLIN, *Of Counsel.*

367 [Endorsed:] C. & R. P. Clarke, libelants, *vs.* S. S. "Elfrida," claimants. Agreement regarding transcript.

368 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the fifth circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which Pyman, Bell & Co., claimants of the steamship "Elfrida," are

appellants and Charles Clarke and Robert P. Clarke, composing the firm of Charles Clarke & Co., are appellees, which suit was removed into the said circuit court of appeals by virtue of an appeal from the district court of the United States for the eastern district of Texas, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme
369 Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the eleventh day of March, in the year of our Lord one thousand eight hundred and ninety-seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

370 UNITED STATES OF AMERICA, }
Fifth Judicial Circuit. }

I, James M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, in pursuance of the agreement of counsel attached to the within writ and asked to be taken as a part of this return, do hereby certify that the transcript of the record of the cause named in the within writ now on file in the office of the clerk of the Supreme Court of the United States is a true, full, and perfect transcript of the record and proceedings in said cause as fully and completely as the same remains of record in the United States circuit court of appeals for the fifth circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the fifth circuit, at the city of New Orleans, State of Louisiana, this 22nd day March, A. D. 1897.

[Seal United States Circuit Court of Appeals. Fifth Circuit.]

JAMES M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

[Endorsed:] No. 16494. Supreme Court of the United States. No. 308. October term, 1897. Charles Clarke *et al.*, petitioners, *vs.* The Steamship "Elfrida," Pyman, Bell & Co., cl'm'ts. Writ of certiorari and return. Filed March 16, 1897. J. M. McKee, clerk. Filed Mar. 26, 1897.

Endorsed on cover: Case No. 16,494. U. S. C. C. of appeals, 5th circuit. Term No., 308. Charles Clarke and Robert P. Clarke, petitioners, *vs.* The Steamship "Elfrida," Pyman, Bell & Co., claimants. Filed February 15, 1897.

No. 308.
Brief of Petition for
Office Supreme Court, U. S.
FILED
FEB 15 1897
CLERK

Filed Feb. 15, 1897.

Supreme Court of the United States.

CHARLES CLARKE AND ROBERT P. CLARKE,
Libelants and Appellants,

AGAINST

STEAMSHIP "ELFRIDA," PYMAN, BELL & CO.,
Claimants and Appellees.

PETITION FOR CERTIORARI.

JAMES B. & CHARLES J. STUBBS,
JOSEPH H. WILSON
and HENRY M. EARLE,
Proctors for Petitioners.

Supreme Court of the United States.

CHARLES CLARKE AND ROBERT P. CLARKE, *Libelants*,

AGAINST

STEAMSHIP "ELFRIDA," PYMAN, BELL & Co., *Claimants*.

Notice is hereby given that upon the petition of libelants above named, a copy of which is hereto annexed, and upon all the pleadings and proceedings in said cause of record in the United States Circuit Court of Appeals for the Fifth Circuit, we shall submit a motion to this honorable court for *certiorari* to remove the whole record and cause herein to this court, at the opening of the court on Monday, the 22nd day of February, 1897, or as soon thereafter as counsel can be heard, at the capitol in the city of Washington.

Galveston, Texas, February 1, 1897.

JAMES B. & CHARLES J. STUBBS,
JOS. H. WILSON, AND
HENRY M. EARLE,
Counsel for Libelants and Appellees, Charles Clarke and Robert P. Clarke.

To

MESSRS. WM. B. LOCKHART AND CONVERS & KIRLIN.

TO THE SUPREME COURT OF THE UNITED STATES:

The petition of Charles Clarke and Robert P. Clarke for a writ of *certiorari* to the honorable judges of the Circuit Court of Appeals for the Fifth Circuit to require that the whole record and cause be removed into the Supreme Court in a certain suit in admiralty, wherein the petitioners are libelants against the steamship Elfrida, whereof Pyman, Bell & Co., are claimants, respectfully shows:

1. Applicants proceeded against the steamship Elfrida to enforce a contract made October 15, 1894, between the steamer, acting through her master, and applicants, by the terms of which they undertook to float and place in a safe anchorage the Elfrida, then stranded west of the jetty at the mouth of the Brazos river, on the coast of Texas; to furnish all labor and material therefor at their cost, including a diver and necessary apparatus to survey said vessel, and to complete the work within twenty-one days, for which, if successful, they were to receive $22,000.00. The master, however, reserved the right to abandon the ship in favor of applicants in lieu of the $22,000.00, if he so desired. Should the applicants fail to float and place her in a position of safety within the twenty-one days, they were not to be paid anything. The use of the crew and engines of the steamer were placed at the disposal of applicants. The Elfrida had been driven up on the beach a distance of one thousand feet from water of sufficient depth to float her. She drew eleven feet, ten inches, and was imbedded in the sand about six feet at the bow and four feet at the stern. Her draught, after pumping out water ballast, was nine feet. A strong wind and sea had forced her over the jetty on October 6, 1894. On the next day a cable chain and wire rope attached to the anchors, which had been let go, broke in two, and, with

the anchors, were lost, and so she was driven further up on the beach. The two following days the sea was smooth and the wind light. On October 10th a strong southerly gale and a high sea caused her to bump and strain heavily. The weather continued bad until the 13th, when it moderated; on the 14th and 15th a strong southeast gale and very high sea prevailed, but the ship was fast imbedded in the sand and did not thump. On the 16th the weather was again fair, and on the 17th it was very fine. On this day the vessel was taken off by applicants, who had been several days in securing and equipping the necessary vessels and plant for that purpose. The master had previously ineffectually attempted to take her off with the aid of her own anchors, cable, gear and a tugboat, but had failed, losing two anchors and cables and straining the ship's appliances. She was practically helpless for at least eight days before the contract for salvage was made. From the time she went ashore, the master was in communication with the agent of the ship at Galveston, who also had a representative upon the ground, and with Lloyds' agent, in the interest of the underwriters, who was on the vessel two days after it stranded, and by cable with her owners. Before he made the contract, the master acquainted himself fully with the nature of the shore and the serious conditions, as well as the likelihood of the ship being damaged or lost, and endeavored to make arrangements for her salvage with the lighter company at Galveston, but could not come to any agreement with them. He also sought information and advice from the pilots at Velasco and the masters of other vessels in that port, and after the fullest inquiry and investigation, and after refusing an offer made by applicants to undertake the floating of the ship for such compensation as the United States Court might award, he concluded to solicit bids. The ship's and Lloyds' agents concurred in this course.

In response, he received two proposals, one offering to do the work for $24,000.00, the other for $22,000.00. He cabled the lowest to his owners and was instructed to accept it, if lower impossible. *"No cure, no pay."*

Under this authority he entered into a contract with applicants as above set forth. At that time, according to the evidence and without conflict, all parties thought the matter of floating the ship would be a difficult and tedious task, necessarily taking time, and uncertain as to the result. That the master and owners so believed is shown by the fact that they required the contractors to do the work in twenty-one days, and stipulated for the option to abandon the ship in lieu of paying the compensation agreed upon, and that the contractors so believed is shown by their extensive preparations. They hired a large force of men, between thirty and forty, procured nearly a month's supplies, cables, chains, anchors, two tug boats, two lighters and two schooners, fully manned and equipped. Some of this plant belonged to them, but the schooners and lighters and their anchors and chains were hired. For one of the lighters they agreed to pay $6500 if she should be lost. All this property, worth about $50,000, was exposed to risk of loss or damage in the breakers, or by contact with the jetties, upon which the Elfrida struck. They were engaged about five and a half days in preparations and work, and by means of their appliances, skill and experience, with very favorable weather and high tides, the Elfrida was floated. The means used was by planting heavy anchors in deep water, with the aid of a tug and barges, from which cables and lines were carried to the vessel and heaved on with her winches and the steamer thus gradually worked from the bed in which she laid and pulled about one thousand feet until she was afloat. She was worth, according to the evidence, from $90,000 to $110,000.

She was insured for the former sum. The only defense made, so far as the evidence discloses, is that the compensation contracted for was excessive, because of the signal success of the salvors within the short time employed. There was absolutely no proof of any fraud or bad faith on the part of salvors in making the contract.

The amount agreed upon was 20 per cent, or less, of the value of the property saved, and was a moderate, if not low compensation, from the outlook before and at the time the contract was made, and, in view of all the facts, was not excessive or unreasonable, and should be paid. It should be added that Lloyds' representative, as well as the master, cabled the owners and advised acceptance of applicants' tender, and the agreement was reached Oct. 12, but not signed until Oct. 15, 1894.

2. The right to agree upon compensation for salvage service, if not practically denied by the opinion of the majority of the Circuit Court of Appeals, is so restricted by it as to discredit and discourage such agreements and thus impair their efficacy. It not only invites litigation, but puts it in the the power of either party to such contract, however fairly entered into, to be relieved of its obligation, if, in view of the time spent and efforts employed in accomplishing the result, the recompense, after the vessel has been rescued, is deemed either too onerous or too inadequate, whatever may have been the conditions and the probabilities before and at the time of making and carrying out the agreement.

A careful scrutiny of the evidence reveals the main, if not the only, contention upon the part of the vessel to be that, considering the time, expense and labor necessary to save the steamer, too large a proportion of her value had been agreed to be paid. This is not the test, but the real and only question is, or should be, was the bargain fairly made? Or, other-

wise stated, did the salvor impose upon or take advantage of the situation of the master and the vessel, and did the latter have a reasonable time for deliberation?

3. The facts fully sustain the fairness and validity of the contract, and the absence of any improper pressure or undue influence from any source. The services consisted of the successful removal of the steamer from the beach where she had been stranded for ten days. The contract was made in writing a week after she went ashore. She had at first struck and pounded upon the bottom, but, her cable parting, had been driven further up and had settled or become embanked in the sand, and so remained until taken off by applicants. She drew over nine feet. The depth where she lay was several feet less, varying with the tides.

There had been full inquiry and careful deliberation on the part of her master as to the best course to be pursued for several days after the stranding. He thoroughly understood the situation, her exposure to the storms of the gulf, and the great probability, next to certainty, that she would, in the heavy weather which was to be expected at any time in October, be either wholly wrecked, or greatly lessened in value by breaking up, or becoming still more deeply imbedded in the sand, one of which results would have inevitably ensued, according to the history of similar wrecks upon the shores of the gulf. He communicated with his owners by cable during this period and had their approval of the contract. He also sought the advice of the charterers, of the pilots of the port, and of masters of other vessels, whose views agreed with his, and the contract was also with the full approval of Lloyds' agent, who represented the insurance companies. After the fullest investigation, he acted upon his own judgment in engaging libelants to take off his vessel, which conclusion was sustained by all the facts, as

well as by the disinterested information and advice of those with whom he had conferred.

4. Upon these undisputed facts a question of far-reaching importance and gravity arises, affecting the right of freedom of contract, and, as a consequence, valuable maritime interests. Are contracts made upon land, for the relief of stranded vessels, with full knowledge of existing conditions and after many days' delay, subject to the same rules as salvage contracts made at sea by ships in distress without time for deliberation or opportunity to seek other assistance? If the same rules are applicable to both, then were the circumstances attending the making of this contract, as well as those preceding and following it, such as to destroy its validity, and to authorize the substitution of the idea of a majority of the Circuit Court of Appeals as to what is a proper compensation, for the solemn agreement of the parties themselves, fairly entered into, without compulsion, overreaching or bad faith of any kind? Upon the other hand, should not parties in such cases as this "understand that contracts fairly entered into will be strictly enforced in admiralty as well as elsewhere?"

5. A brief outline of the facts proven is given in order that this court may perceive the necessity of reviewing the entire record and correcting the judgment of the Circuit Court of Appeals, which reversed that of the trial court. The latter had the witnesses before it, heard them testify, and, after a full and painstaking consideration of the evidence, argument and authorities, on October 29, 1895, entered its decree, finding, among other things, that the services were rendered in saving the steamship under a contract, in writing made between libelants and her master, who was duly authorized to make the same. That it was a lawful contract and was entered into by the master of the steamship with full knowledge, or means of knowl-

edge, of the said master and of the owners of said steamship of all the conditions then existing, and that the amount named in the contract was not unreasonable, under the conditions.

The decree was, upon appeal by the Elfrida, substantially sustained as to all the findings above recited, except the last, and as to that a majority of the Circuit Court of Appeals held that the amount named was excessive, and reduced it from the sum contracted to be paid to $10,000.00. Circuit Judge Pardee dissented from this annulment of the contract in an opinion so lucid and strong as to justify, if it does not require, a thorough review by this tribunal of a case in which one of the ablest and most experienced admiralty judges in this country has arrived at an opposite conclusion from that reached by the two other members of the court.

A petition for a rehearing was duly made and overruled by the Honorable Circuit Court of Appeals January 26, 1897.

6. The contract for salvage services and compensation should have been enforced, as it was shown, without conflict, that the salvor took no advantage whatever of his situation. The bargain made was not unreasonable. There was no evidence whatever of unfairness or bad faith on the part of the salvors, and the law of contracts is applicable to such agreements as this, at least to the extent of enforcing them in admiralty, where there has been a definite, distinct agreement, with ample time for the parties to consider what they were doing, and where the contract was considered by all at the time it was made to be fair and reasonable.

Post v. Jones, 19 How., 150.

The Agnes I. Grace, 2 U. S. App., 323, 51 Fed., 959.

Jones on Salvage, 99.

The conditions in this age are far removed from those prevailing in the twelfth century, when the laws of Oleron were

promulgated, cited in the majority opinion, and which were essentially directed to the prevention of piracy or extortion of agreements from small wooden vessels in distress upon the high seas, far from any relief, and completely at the mercy of the rescuer.

The just and enlightened rule is as stated in Harley v. 467 Bars R. R. Iron, 1 Sawyer, 2: "Parties may agree on the amount of salvage compensation, or on the principles upon which it shall be adjusted, and such agreement, *if fairly made and no advantage be taken of ignorance and distress, is readily upheld by the courts.*" As observed in that case, in an undertaking of this kind, much is conjectural and salvors necessarily take chances.

Was this agreement fairly made? The master upon shore was surrounded by his friends and those whose interests were the vessel's interest, the ship's agents, the insurance agent, the pilots, in daily communication with his owners, and he himself testified that, if a storm came on, the vessel would be almost inevitably a total loss, having himself failed with anchors, tug boat and other appliances to get his ship off, and having badly strained her and lost a part of her equipment in so doing, the vessel daily settling in the sand, having applied to other sources of relief at hand, and having accepted the lowest offer, after having declined to submit the matter to the courts, being himself a mariner of thirteen years experience and familiar with similar conditions; these facts, and, in fact, the entire record shows that the agreement was a fair and reasonable one and that no advantage of any kind was taken.

7. In such a case, as Judge Story remarked: "The court not only looks with indulgence upon such a contract, but endeavors to fortify itself against the exercise of mere discretion by adopt-

ing and enforcing such a contract as equally just, moral and conscientious."

Bearse v. 340 Pigs of Copper, 1 Story, 323.

All such contracts are presumed *prima facie* to be fair, but if proven to be unconscionable, a court of admiralty, like a court of equity, would not enforce them.

In the Silver Spray (E. D. Mich.), 1 Brown's Adm., 349, the court found that although the bargain was a hard one for the libelant, that it would not be set aside for that cause alone. That he had ample time for consideration, and there was no pretense of any fraud or deception used towards him, or that he did not know the situation and the difficulties in the way. On page 354 the court says: "The contract appears to have been entered into openly and fairly in all respects, and there is no principle and authority upon which the court can disregard it, or make a new contract for the parties. It must be enforced as it stands."

As said in The True Blue, 2 W. Rob., 176, where the contract was enforced, although the disparity was great: "*Parties must understand that contracts fairly entered into will be strictly enforced in admiralty as well as elsewhere.*"

8. The case that we have stated is the substance of all the testimony, and there is no material conflict. The opinion of the majority of the Honorable Circuit Court of Appeals is mainly devoted to a consideration of the question as to what would be a proper and sufficient award of salvage in the first instance, independent of any agreement between the parties; in brief, the court treats the contract as nothing more than an indication of what the parties thought the work should or might be done for, but in no wise controlling. Even upon the basis of salvage, without an agreement fixing compensation, Judge Speers loses

sight of the risk incurred by the salvors, and especially the risk of the time-limit of twenty-one days, but proceeds to make a new contract for the parties, such as they might have made had they known in advance the length of time and amount of effort it required, as shown by subsequent events. This is not the criterion. As we have remarked, such a test applied to any contract in admiralty, or elsewhere, would, in the vast majority of cases, require a readjustment of the compensation. This should not be determined by looking backward, but the court should, as near as may be, place itself in the position of the parties, and under the conditions which existed at the time they entered into the agreement. Having done this, unless the amount agreed to be paid for a successful issue is so exorbitant as to shock the conscience, or to afford satisfactory evidence of fraud or duress, then the agreement should be enforced.

Admiralty does not espouse as its wards the masters and owners of vessels who make their contracts upon land, with every facility for determining what course to pursue, and uninfluenced by the imminence of danger or distress, or absence of other means of rescue, such as confront a vessel wrecked upon an uninhabited coast or helpless upon the ocean.

The authorities reviewed in Judge Pardee's opinion vindicate its soundness, and we refer to that opinion as a part of this application. It is a clear and true exposition of the facts of this case, and is in harmony with reason and the broadening spirit of modern jurisprudence and legislation, which, while according to individuals, the greatest latitude of conduct consistent with their duties as members of society, yet requires of them the discharge of their just obligations, and discountenances repudiation or paternalism, both of which are essentially involved in the defense. An examination of the record in this case will show our clear right, under the acts of Con-

gress and their construction by this court, to the *certiorari* asked for. In addition to the authorities hereinbefore cited, we call attention to the following:

Bondies v. Sherwood, 22 How., 214.
The Alert (S. D., N. Y.), 55 Fed., 721.
The G. W. Jones (S. D., N. Y.), 48 Fed., 925.
The R. D. Bibber (C. C. E. D., Tex.), 33 Fed., 55.
The H. D. Bacon (Mo.), 1 Newb. Adm., 279.
The Adirondack, 2 Fed., 392.
The Guadalupe, (E. D., Tex.), 20 Fed., 445.
The Connemara, 108 U. S., 352.
The Sybil, 4 Wheaton, 98.
The North Erin (E. D., N. Y.), 71 Fed., 430.

9. Your petitioners, therefore, submit that the grave importance of the questions presented, the inviolability of contracts, the absolute freedom from fraud, undue advantage or improper conduct of any kind on the part of the salvors, together with the fact that the member of the court possessing the longest and largest experience, most forcibly dissents from the conclusion of his brethren, all require that full consideration of the circumstances of this case, which can only be gained by an examination of the entire record, and thereby this court can best determine and settle the questions which arise.

We respectfully and earnestly urge that the decision of this case by two of the three judges of the appellate tribunal overrules, in effect, its former decisions and is directly opposed to the views of this court announced in the cases which we have cited.

Wherefore, your petitioners pray that this Honorable Court will be pleased to grant a writ of *certiorari* in this case to the United States Circuit Court of Appeals for the Fifth Circuit to

remove the whole record and cause into this honorable court and for such other and general relief as to this court may seem just.

CHARLES CLARKE AND ROBT. P. CLARKE,
By their Proctors,
JAMES B. & CHARLES J. STUBBS,
JOSEPH H. WILSON, AND
HENRY M. EARLE.
W. W. Baker

Eastern District of Texas,
City and County of Galveston.

James B. Stubbs, being duly sworn, says that he is a member of the firm of James B. & Charles J. Stubbs, proctors for libelants, and is authorized to make this verification, that he has read the foregoing petition and knows the contents thereof, and that the same is true to the best of his knowledge and belief. The sources of deponent's knowledge and the grounds of his belief are found in the proceedings and in the record of the cause in the District Court and in the United States Circuit Court of Appeals for the Fifth Circuit.

JAMES B. STUBBS.

Sworn to and subscribed before me this 1st day of February, A. D. 1897.

[SEAL] E. BURKEY,
Notary Public, Galveston County, Texas.

I hereby certify that I have examined the foregoing petition, and, in my opinion, it is well founded, and the prayer of the petitioners should be granted.

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POINTS AND ARGUMENT, TO WIT:

When a salvage contract has been fairly entered into and the salvor has not taken advantage of his power to make an unreasonable and inequitable bargain, the fact that the compensation may be deemed excessive, on account of the work having been performed in less time and with less trouble and expense than was expected, will not justify setting it aside, as the parties had the right and were presumed to take into consideration all the elements of uncertainty and the interests at stake in making the contract 44-62

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The amount decreed in the trial court will not be reduced, even when there is no contract, unless for clear and palpable mistake, or gross over-allowance, none of which existed in this case..... 74-77

The burden of proof, under the decision in the Agnes I. Grace, *sup.*, and other cases, which we have cited, was upon appellants..... 77

The charges of collusion between competing salvors is refuted by the evidence, and can not affect the nature and value of the services, or the merits of the contract..... 77-79

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No. 60.

Supreme Court of the United States,

OCTOBER TERM, A. D. 1898.

CHARLES CLARKE AND ROBERT P. CLARKE,
LIBELLANTS AND PETITIONERS,

VS.

STEAMSHIP ELFRIDA; PYMAN, BELL & CO.,
CLAIMANTS.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR LIBELLANTS.

STATEMENT.

Libellants, Charles Clarke and Robert P. Clarke, composing the firm of Charles Clarke & Co., of Galveston, Texas, on October 24, 1894, filed their libel in the United States District Court for the Eastern District of Texas, against the steamship Elfrida, to recover the sum of $22,000, with interest and costs, claimed to be due them for services rendered in the performance of a contract with the master, and which was in these words:

"THE STATE OF TEXAS,
"County of Brazoria.

"This agreement, made and entered into this 15th day of October, 1894, between the steamship Elfrida, and the owners thereof, represented herein by B. Burgess, master of said steamship, as party of the first part, and Charles Clarke & Co., of Galveston, Texas, as party of the second part,

"Witnesseth, that for and in consideration of the covenants and agreements herein contained on the part of the said party of the first part, to be kept and performed, the said party of the second part hereby agrees and binds himself, his administrators and assigns, to float and place in a safe anchorage, Quintana or Galveston, as directed, the S. S. Elfrida, which is now stranded west of and near to the west jetty at the mouth of the Brazos river, in said County and State; to furnish all labor and material at the cost of said party of the second part, and to furnish diver and necessary apparatus to survey or examine the bottom of said steamship, and to complete the same within twenty-one (21) days from date hereof.

"The said party of the first part agrees to pay to the said party of the second part for such services, i. e., when he shall have successfully floated said ship, as above set forth, the sum of twenty-two thousand dollars ($22,000). The said party of the first part,

however, reserving the right to abandon the ship to and in favor of the said second party in lieu of the amount of $22,000 agreed to be paid as aforesaid.

It is further understood and agreed by and between the parties hereto that should he fail to float and place in a position of safety, as above stated, said steamship within the time hereinbefore specified, to wit, 21 days from date hereof, the said party of the second part shall receive no compensation whatever from said first party for work performed, labor, tools or appliances furnished.

"Anything that may be discharged to enable vessel to float shall be replaced when she is in a position of safety. It is also agreed and understood that the use of the crew and engine shall be at the use and disposal of said party.

"Witness the hand of B. Burgess, master of the steamship Elfrida, for himself, said ship and the owners, party of the first part, and the hand of Charles Clarke & Co., party of the second part, this fifteenth day of October, 1894.

"BENJ. BURGESS.
"CHARLES CLARKE & CO."

"Witness:
"M. P. MORRISSEY,
"J. H. DURKIE,
"Master S. S. Lizzie, of Whitby." (Tr., 25, 31.)

Amended pleadings were filed by both sides. The principal averments of the answer were, in substance, that the agreement was signed by the master under a mutual mistake of fact, or by mistake on his part, which libellants took advantage of, as to the danger in which the vessel was, and that it was improvidently made for an excessive compensation without a proper understanding by him of the vessel's alleged freedom from danger. That the master had been prevented from carrying out his instructions

to accept a tender made, if lower impossible, by information of the cable being conveyed to the salvors before the master saw it. That the parties were not upon an equal footing. That libellants made an unreasonable bargain with the master by reason of the stress of the situation and that of his vessel, and acted collusively with other salvors in obtaining from him the agreement.

That libellants had not removed the steamship from the beach by the means they had contracted to use, but had also used the ship's winches and tackle contrary to the agreement.

Libellants replied, specifically denying the matters stated as grounds for annulling the contract, and gave in detail the facts preceding and attending the execution and fulfillment of the contract. (Tr., 8 to 23.)

The references which we shall make to the evidence upon both sides render unnecessary a further recital of the allegations.

The District Court entered its final decree in favor of libellants October 29, 1895, awarding them $22,000, the amount stipulated to be paid by the contract, with interest and costs. The court found from the evidence "that the services rendered by the libellants in saving the steamship Elfrida, her tackle, apparel and furniture, were and are salvage services and are entitled to be paid for and compensated as and for salvage services"

The decree proceeds:

"The court further finds from the evidence that the said salvage services were rendered by the libellants in saving the said steamship, her tackle, etc., under a contract in writing, made between the libellants and Benjamin Burgess, the master of said steamship Elfrida, in possession of said steamship at the time, and as such master was duly authorized to make the same; and the court further finds from the evidence that said contract was a lawful contract, and that the same was entered into by the said master of said steamship with full knowledge or means of knowledge of the

said master and of the owners of said steamship of all the conditions then existing, and that the amount named in said contract was not unreasonable under the said conditions." (254.)

Claimants appealed to the Honorable Circuit Court of Appeals for the Fifth Circuit, which on November 17, 1896, reversed the decree of the District Court and remanded the cause, with instructions to that court to enter a decree in favor of libellants and against claimants and their sureties for the sum of $10,000, with interest at six per cent per annum from the date of filing the original libel, and for costs of the District Court and the costs of the appeal were adjudged against libellants. (260.)

On December 7, 1896, a petition for rehearing was filed in the Circuit Court of Appeals and was by it denied on January 25, 1897. (261-2-3.) Thereupon libellants applied to this court for a writ of certiorari to the Circuit Court of Appeals, requiring the whole record to be removed into the Supreme Court, which application was filed and granted in February, 1897, to all of which proceedings reference is made.

The evidence relating to the more important subjects has been compiled by us under the proper heads and is here presented.

THE STRANDING.

On October 5, 1895, the British steamship Elfrida, of 1454 tons net register, 290 feet long, 38 feet in breadth, 20.1 feet in depth and drawing 11 feet, 10 inches, was crossing the bar at the mouth of the Brazos river on the coast of Texas bound for Velasco, a few miles up the river. The United States government had extended jetties from the right and left banks of the river out into the Gulf, the outer end of these jetties for a distance of two thousand feet or more being submerged. The heel of the ship touched, there being but five inches between the bottom and the bar, and

an easterly wind swung her bow against the west jetty. (147, 82, 237.)

The steamer's log records these and other more material details clearly and briefly, and that part of it that relates to the stranding, condition of the ship and the salvage is here given: (245.)

"Friday, October 5th, 1894.

"0.45 a. m. hove up anchor and proceeded, pilot on board.

"1.15 p. m. ship grounded inside Velasco breakwaters, there being a strong wind and sea on ship's broadside, her bow drifted alongside the breakwaters; we then run out a kedge from starboard bow and hove taught with windlass, engines going full speed astern, but could not move the ship; wind and sea still increasing.

"5.00 p. m. run the kedge anchor out again and made another effort to float the ship, but was unable to do so, ship having drifted further on the breakwater.

"7.30 p. m. Tide falling, and there being too much sea on to run out another kedge, we finished with the engines for the night.

"Midnight, wind and sea still increasing, ship straining and bumping heavily.

"Saturday, October 6th, 1894.

"6.0 a. m. weather slightly moderating.

"6.30 a. m. made another attempt to float the ship, but without any success.

"11.0 a. m. wind and sea moderating, tug boat run out starboard bow anchor and 50 fathoms of cable by a six inch hawser which was badly strained and broken, likewise one coil of 3¼ inch manilla rope was badly strained; we then hove cable taut and waited until high water.

"At about 8 p. m., the ~~weather~~ water then being at its highest, we hove up on the anchor and worked engines according to judgment;

after pumping on number three tank for some time, ship drifted over breakwater and grounded on the other side; we then let go the port anchor to prevent her from drifting further on to the shore.

"9.30 p. m. Tide falling; finished with the engines for the night.

"10.0 p. m. run out stream anchor (10 lwt.) and 2½ inch wire attached from starboard quarter.

"Midnight, wind and sea increasing.

Sunday, October 7th, 1894.

"About 2.0 a. m. very strong N. E. wind and high sea; cable chain parted and ship drifted further on to the beach. The wire rope aft parted likewise and all were lost.

"8.0 a. m. Wind and sea moderating.

"P. M. Wind and sea still moderating.

Monday, October 8th, 1894.

"A. M. Wind moderating. Crew variously employed.

"P. M. Weather fine and sea smooth.

~~*Monday, October 8th, 1894.*~~

"~~A. M. Wind moderating. Crew variously employed~~.

"~~P. M. Weather fine and sea smooth~~.

Tuesday, October 9th, 1894.

"A. M. Wind light and weather fine. Crew variously employed.

"P. M. Moderate S. W. Breeze and fine weather.

Wednesday, October 10th, 1894.

"A. M. Very strong southerly gale and high sea, ship straining and bumping heavily.

"P. M. Wind and weather the same.

Thursday, October 11th, 1894.

"A. M. Strong wind and heavy sea. Crew variously employed.

"P. M. Wind and weather the same.

Friday, October 12th, 1894.

"A. M. Strong wind and heavy sea. Crew variously employed.

"P. M. Wind and weather the same.

Saturday, October 13th, 1894.

"A. M. Moderate easterly breeze. Crew variously employed.

"P. M. Wind and weather the same.

Sunday, October 14th, 1894.

"A. M. Very strong S. E. gale and very high sea; ship fast on the ground.

"P. M. Wind and weather the same.

Monday, October 15th, 1894.

"A. M. Very strong S. E. gale and very high sea; ship still fast on ground.

"P. M. Wind and weather the same.

Tuesday, October 16th, 1894.

"A. M. Wind and weather moderating. Crew assisting to run anchors out from aft, in order to get the ship afloat.

"P. M. Moderate breeze and fine weather.

Wednesday, October 17th, 1894.

"A. M. Weather very fine. This day salvors engaged trying to float ship, they heaving on anchors, with tugboat astern, engines working likewise.

"At about 7:30 p. m. vessel afloat and proceeded to sea to await daylight to enter. Crew employed assisting salvors, etc.

Thursday, October 18th, 1894.

"7.0 a. m. Arrived and moored alongside of river bank at Quintana to be surveyed. Salvors picking up anchors, which were used to get ship off. Vessel's winches, windlass, cable, likewise ropes were badly strained and damaged; size of ropes 2.6 inch, manila, 3 coils 3½ inch manila.

One stream anchor with 2½ inch wire attached and one bow anchor with 15 fathoms cable were lost, salvors being unable to recover them. On examining small boat, we found that it had been badly strained, and leaking; caused by running out kedge anchors.

Friday, October 19th, 1894.

"A. M. Weather very fine.

"Surveyors surveyed ship, going through all tanks, bilges, peaks, etc.,reporting indentations at various parts of bottom of tanks, where cement was broken. On close examination of the steam steering gear, we found that it had been badly strained; it working very badly, probably by rudder working on sand.

Saturday, October 20th, 1894.

"A. M. Weather very fine.

"Divers engaged in examining ship's bottom, outside under water, they reporting everything all right with the exception of a few slight indentations.

"Had engine turned, and found that propeller had pieces broken off four blades." (219 et seq.)

DEPTH OF WATER WHERE VESSEL WAS STRANDED.

This varied with the tides. (63, 120, 238.)

Elfrida drew 11 feet, 10 inches. (Coveney, 90; Burgess, 237.)

The pilot, A. Coveney, a witness for claimants, was asked:

Q. "What water was there around her where she was stranded before they began to move her?"

A. "Seven feet and 9 inches aft. I sounded it at the time. On top or high water it was a 3.2 tide."

Q. "Had you taken any soundings when you were there during the time before you went ashore?"

A. "Yes; Capt. Brock, Capt. Burgess and myself."

Q. "What was the water then?"

A. "About four feet forward."

Q. "Tell us the result of your own soundings, the depth of water around her on the 9th."

A. "About 4 feet right forward, and there was about 6 feet aft."

Q. "That was with the ballast in?"

A. "Yes, sir."

Q. "At what water?"

A. "I could not tell you what the tide guage was at that time, but I know it was not as high as it was when she came off." (86.)

"The steamer's draft when libellants began to move her was 9 feet 6 inches aft and 9 feet forward." (Coveney, 87-89.)

At the time she was taken off the tide was much higher than usual. (Ib., 89.)

It is true that the tide gauge at Galveston Bar, forty miles distant, recorded, on October 17th, 2.6 feet (120), but Lieutenant Judson testified that the difference in the winds between Galveston and Velasco, forty miles away, would make a difference in the tides at the two places, and that no gauge was kept at Velasco.

M. P. Morrissey, called by libellants, testified (52) that the tide

was unusually high in the river at Velasco, about four miles from the mouth, the day the ship was taken off.

Burgess, captain of the vessel and claimants' witness, testified that after she was stranded the water was 6 feet deep at the stem and 8 at the stern (238) and that by pumping out her ballast he could reduce her draft from 11½ feet to 9½ feet, which he did before the salvors commenced work. (207-8.)

Peter Scott, the first mate, also called by claimants, testified that the draft of the vessel was about 12 feet, and that where she was beached was about 9 feet at high water just directly astern. That he wrote up the log every day. (227.)

J. C. Charleson, second mate of the Elfrida, deposed that the vessel was lying in 8 or 8½ feet of water, about 200 feet from the beach. (234-5.)

AS TO THE SAND BANKING ABOUT THE ELFRIDA, OR HER SETTLING, OR BECOMING IMBEDDED THEREIN.

Upon this point we quote from Mr. Coveney, the pilot, and claimants' witness:

Q. "How much farther did she go in (after crossing the jetty)?"

A. "About 600 feet."

Q. "Did she change her position from that time till she was got off?"

A. "She was working in the sand; where the vessel went the sand would give way and she would settle." (84.)

Q. "Did you see any signs of sand banking about her?"

A. "Yes, under the bluff of the bow."

Q. "Alongside the stern?"

A. "Right under the bluff of the bow it had banked. The vessel was certainly settling in the sand." (87.)

This was the only banking he knew of, but he was way from the ship from the 9th to the 17th, when she was floated. (84.)

Q. "If the wind had changed to the southeast, would there have been danger of the sand banking?"

A. "Probably not from the southeast, because it was right in line with the ship, but if it had gone to the southwest it would have banked probably, or thrown the vessel broadside on the beach."

Q. "What then about the difficulty of getting her off?"

A. "She might have bilged." (88.)

Q. "You speak of her settling in the sand with the sand banking on the bluff of her bow, and that she was settling in the sand her entire length. How deep did she settle in the sand?"

A. "About two feet, maybe." (89.)

The ship's log shows that on October 10th there was a strong southerly gale and high sea, and the ship strained and bumped heavily. The weather moderated, but on the 14th a southwest gale came up and very high sea, "ship fast on the ground."

On the 15th a like wind and sea, "ship still fast on the ground." It is thus evident that either the ship had settled, or the sand had formed about her, or she had been driven higher up since October 10th. Otherwise, she would have continued in rough weather to have strained and bumped as she did on the 10th. (247.)

This log, as the ship's daily record, made before any salvage or litigation, and kept by the first officer in the line of his duty, is entitled to the highest consideration. It can not be easily sworn away.

The witness, Morrissey, who was agent of the charterers, was asked if there was any change in the position of the vessel on October 11th, the day Mr. Langbehn, one of the charterers, was there.

A. "No. The only time I heard was when the captain told me

he had been working with anchors and that she had gotten higher up."

Q. "Did you hear talk of sand banking?"

A. "Yes, sir."

Q. "From whom?"

A. "The captain."

Q. "Did he say whereabouts?"

A. "He did not go into details."

Q. "Was there any talk between you and the captain with reference to the increased cost of moving the vessel in case the sand banked?"

A. "I think there was. I told him the more sand banked up the more it would cost to get her off." (65.)

In another place will be found a further summary of the evidence as to the nature of the sand, the likelihood of the vessel settling deeper in the sand, or a bank drifting about her. We do not give it here, as it is probably more germane to the topic under which it is hereinafter collated.

CIRCUMSTANCES UNDER WHICH THE CONTRACT WAS MADE, AND WHICH SHOW THAT IT WAS A FAIR AND REASONABLE ONE UNDER THE EXISTING CONDITIONS AND PROBABILITIES.

The correspondence by cable shows that the owners of the Elfrida were apprised of her condition and of the tenders solicited and made for floating her; that they regarded the same as excessive and caused Lloyds' to communicate directly with their agent, who was upon the ground and acquainted with the situation, and advised acceptance of the lowest bid. All of these messages that appear to be in the least material are here set out. From these, as well as from the letter from the master, dated October 7, and

that from Moller & Co., dated October 9, both of which claimants received in due course of mail, about nine days, as we think the deposition of claimant Bell practically admits (151), it is clearly shown that claimants must have known the situation of the vessel; that she was low to the shore, not injured, or very slightly so, as well as the probable dangers to which she was exposed; and yet, if, as they now say, they did not consider her in any special danger, and regarded the contract as excessive (as they had wired), why did they not, with the full information they had, certainly conveyed by the letters, if not by the messages, at once disaffirm the contract? The answer is that they wanted to wait until the ship had been taken off a lee shore and then repudiate their agreement and contend for à reduced recompense. They should not be allowed to thus break faith and play fast and loose.

(Cable from Burgess, 157, 191.)

"Velasco, Texas, October 7, 1894.

"Pyman, Newcastle:

"Sinecure (1), Friday scandal (2), signally (3), synoptic (4), artillery (5)."

(Translation): 1. The ship grounded at the entrance of the harbor Friday. 2. She is fast head and stern. 3. The ship is in a critical position. 4. Have sent for assistance. 5. The ship was in charge of a Government pilot.

"Galveston, October 8, 1894.

"Pyman, Newcastle:

"Elfrida stranded, Velasco breakwater, menterie (1), invertebre (2), kreosote (3), ivican (4).

"MOLLER."

(Translation): Elfrida stranded. Velasco breakwater. 1. She is beached. 2. She is not out of danger yet. 3. Assistance has been sent. 4. She still continues tight. (150, 163.)

"Velasco, Texas, October 8, 1894.

"Pyman, Newcastle:

"Vessel same position. Lloyds' agent not arrived.

(158.) "ELFRIDA, BURGESS."

(Cable sent by Pyman, Bell & Co.)

"Newcastle, October 9, 1894.

"Steamer Elfrida, Velasco:

"Gladdening (1), speaker (2), surgeon (3), sexton (4), governing (5)."

(Translation): 1. How are matters progressing? 2. What are the probabilities of the ship getting off? 3. Is the ship much damaged? 4. What is the nature of the ground where the ship struck? 5. Keep us fully informed. (161.)

"Velasco, October 9, 7:30 p. m.

"Pyman, Newcastle:

"Lloyds' agent here, (1) serpent, put ship Galveston, including diver, lowest bid forty-five eighty pounds, Lloyds' and myself recommend acceptance; vessel easy, bottom sandy. One thousand feet from deep water.

"BURGESS, ELFRIDA."

Translation of above code word "serpent": Advertised for tenders to get the ship afloat on the principle of "no cure, no pay" (158, 218.)

(From Pyman.)

Newcastle, October 10, 1894.

"Burgess, Steamer Elfrida, Velasco:

"Don't act without our instructions; Lloyds' underwriters communicating direct as consider tender excessive; try get condition in tender giving us right abandon vessel to salvors in lieu of salvage charges." (162, 185.)

The following cablegram was from Lloyds' agent of Galveston, but then at Velasco examining into the stranding, and advising with the master:

Velasco, October 9, 7.20 p. m.

"Lloyds', London:

"Elfrida lies easy 1000 feet from deep water. Master and I have two proposals to float ship and place in Galveston. No success, no pay. Lowest bid, £4,580. Recommend acceptance. Waiting answer here.

(186.) "SORLEY."

"Velasco, October 11, 4.4 p.

"Pyman, Newcastle:

"Delay will cause danger of sand banking; also increasing cost of floating.

(158, 190.) "ELFRIDA, BURGESS."

In obedience to instructions in cable of October 9, to keep owners informed, the master further reported on October 12:

"Velasco, October 12.

"Pyman, Newcastle:

"Fresh breeze blowing; rough sea; vessel laying easy; making no water; afraid of sand banking up.

(158, 149, 190, 218.) "ELFRIDA, BURGESS."

Claimants upon the same day sent the following cablegram:

"Newcastle, October 12, 1894.

"Burgess, Steamer Elfrida, Velasco:

"Accept tender forty-five eighty if lower impossible. No cure, no pay. Try include in agreement if steamer after coming off not worth amount of salvage, steamer in damaged state to be taken in payment of salvage.

(162, 190.) "PYMAN."

When the contract was fully agreed upon Capt. Burgess cabled claimants:

"Velasco, October 15, 1894.

"Pyman, Newcastle:

"Have accepted tender forty-five eighty with right to abandon; lower impossible; commence work today.

(159, 218.) "ELFRIDA, BURGESS."

The following cablegrams subsequently passed between owners and master:

"Velasco, October 18.

"Pyman, Newcastle:

"Elfrida floated; will survey.

(159, 218.) "BURGESS."

"Velasco, October 18.

"Pyman, Newcastle:

"Moller advises underwriters refuse insure unless dry docked; nearest dock Norfolk. Instruct settlement salvage, also docking.

(159.) "BURGESS, ELFRIDA."

Claimants replied as follows. (We give the message as translated:

"Newcastle, October 18, 1894.

"Steamer Elfrida, Velasco:

"When where survey; if the report of the surveyor (or diver) be favorable and certificate of seaworthiness granted by Lloyds' can you save cancelling date; must ship be put into dry dock; which is nearest?" (162.)

"Velasco, October 19.

"Pyman, Newcastle:

"The extent of the damage is not yet ascertained. The examination must be by diver. The diver can not go down at present. Expect tomorrow. The ship is quite tight. The ship will be

surveyed tomorrow. The nearest place for repairs is Norfolk. Impossible save charter. Moller refuse accept until dry docked. (159.) "BURGESS."

"Galveston, October 20.

"Pyman, Newcastle:

"Vessel surveyed. Diver reports no damage. Slight indentation. Moller refuse accept unless dry docked. Not necessary. (160.) "BURGESS."

"Galveston, October 23.

"Pyman, Newcastle:

"Have Lloyds' certificate, likewise surveyor's (diver's) report of seaworthiness; will put vessel in berth, serve notice of readiness, await results. (160.) "BURGESS, ELFRIDA."

"Newcastle, October 22, 1894.

"Steamer Elfrida, Galveston:

"Arranging payment salvage, London; proceed Hampton Roads." (162.)

This was evidently an answer by claimants to the master's message of October 18.

On the 23rd claimants wired:

"Steamer Elfrida, Galveston:

"Repeat joint names describing who they are. Money ready and underwriters wish know if salvage contract is on their form and pending receipt contract wish money deposited joint names ourselves and salvors." (163.)

Captain Burgess replied:

"Velasco, October 24.

"Pyman, Newcastle:

"Charles Clark, R. P. Clark, Galveston, contractors, wreckers, notary form, will not release until money deposited. (160.) "BURGESS, ELFRIDA."

Again, he cabled upon the same day:

"Velasco, October 24.

"Pyman, Newcastle:

"Ship arrested. Must sign release Galveston. Wire instructions.

(161, 189.) "BURGESS, ELFRIDA."

Annexed to and a part of Bell's deposition is the letter from the master, dated October 7, from which we give this extract:

"At about 9 p. m., Saturday, a big sea running the vessel showed indications of driving up on to the end of the visible breakwater, I hove on the anchor and tried to get her into a safer position, but on account of the sea running the vessel worked herself right over the breakwater, and up on to the beach alongside of breakwater, head into shore. We lost an anchor and about thirty fathoms chain in trying to keep her from the beach, the cable breaking. She now lies on the beach in a better position and not so liable to do so much damage. When the weather moderates we will have another try to float her. I have telegraphed Moller, Galveston, to inform Lloyds', as there is no means of assistance here. I came on shore this morning in the coast guard lifeboat and after a lot of trouble we managed to land on the beach. I don't think the vessel is damaged to a very large extent, in fact up to my coming on shore there was no sign of water anywhere. We expect Lloyds' agent here tonight or morning from Galveston."

We also quote from Moller & Co.'s letter to claimants, dated October 9, 1894:

"She swung around the outer end of the jetty where she fetched up on a sandy beach, where she now lies stern to sea in 9 feet of water and 6 feet at stem. With her full water ballast on board she lies firmly imbedded in sand, and does not of course move.

"This is practically all the information we have to hand so far.

Velasco is situated forty miles south of Galveston, at the mouth of the Brazos river. We suppose Captain Burgess has already notified you with as many particulars as he could give, inasmuch as he can cable you direct from Velasco. We expect him, together with Lloyds' agent, here tomorrow, when some steps will doubtless be taken (after a proper survey has been held) to heave the vessel off. We fear, however, this will be rather a tedious job, as she has to be forced through the sand out to deeper water, which is a precarious piece of work, as strong on shore winds occasionally spring up, creating considerable swell, at which time work will have to cease.

We are not sure if local wreckers here will be able to get the vessel off, and it may become necessary to procure help from the Merritt Wrecking Company, or similar institutions. We will, however, inform you regularly what progress is being made."

It was sought to be charged that Lloyds' agent, by reason of his age, 75 years, and his infirmities, could not properly attend to his duties. The record does not sustain this. He went from Galveston on the 9th of October to the stranded vessel and remained there and at Velasco for two days.

After the vessel was taken into Velasco by Clarke several telegrams passed between Burgess and Sorley relating to the survey held upon the vessel, and inquiring whether Sorley would accept the same for Lloyds', to which he assented, after having received the report of the divers and the surveyors.

The ~~evidence~~ claim that Lloyds' agent was not capable of understanding the situation and safely advising the master, or that he did not do so, is without foundation. He went to the stranded vessel, was aboard of her, knew the situation and knew what the risks were, and did the very best that could have been done under the circumstances, that is to solicit bids for floating the ship, and he recommended the acceptance of the lowest competing offer. The

whole body of the evidence vindicates the soundness of his advice. The claimants concurred in it, with knowledge of the facts, although questioning through Lloyds' the tender, because of its amount, and they acted on it, and said naught to the contrary until after the vessel was saved.

On the 7th Burgess had wired J. Moller & Co. at Galveston to advise Lloyds', and he followed it on the 8th with a telegram to the Brtish consul in these words: "Please inform me whether Lloyds' agent has left for Velasco, re-Elfrida. If not, request him to do so, as I do not care to make any arrangements until his arrival." The same day, Mr. Sorley, Lloyds' agent, wired Captain Burgess: "Will come down tomorrow; meantime, run anchors to keep afloat." (182, 185.) The captain had been running anchors, but had lost at least two with their cables.

Sorley went to Velasco and, after investigation, advised Burgess to call for tenders, which he did and obtained at least two. The notice received by Clarke was dated October 9, and was in the following language:

"Please tender for to float and place in a place of safety, say Galveston, where her bottom can be examined, furnishing diver and his apparatus also to furnish all material and labor in floating said S. S. Elfrida; also time required. Reply at your earliest convenience under seal to James Sorley, Lloyds' agent, or myself. No cure no pay. Yours truly,

"B. BURGESS, Master."

"P. S. A convenient time to be allowed to get the ship off, and if at the expiration of the time the vessel is still aground, all claims on this contract to cease and to be null and void.

"B. BURGESS, Master."

How many of these tenders were sent out does not appear, but the master in response received two propositions, one for the sum

of $24,000 and one for $22,000. He cabled the lower proposition to his owners and received instructions as before stated.

Claimants contend that the master cabled his owners only partial information of the situation of the vessel, and that his apprehension that sand would bank around her was based upon representations made to him by Clarke.

If his reports were not full enough, and, for instance, did not inform the owners whether she was lying head or broadside on the beach, it seems to us they could and should have made the inquiry. It is evident that they relied, to a great extent, upon the advice of Lloyds' agent, for they claimed that the bid was excessive and had Lloyds' to communicate directly with their agent, who replied stating the ship's condition and advising acceptance of Clarke's bid.

As a fact the sand had actually banked around a part of the vessel, if not entirely, according to the master's, the pilot's and other testimony, which fact the master did not report, and her condition was in that respect worse than he stated. It is true that he testified in general terms that Clarke apprehended, as he did, that the vessel might become deeply embanked in the sand, and the impression might arise from his statement that he sent the cables of October 11 and 12, upon the suggestion by Clarke of the danger. They were not both sent upon the 11th, at least Bell's testimony shows to the contrary. (149.)

It is claimed that the owners acted upon these dispatches, supposing they were based upon some visible indications of the dangers suggested, although they only expressed a fear as to the future.

Clarke returned to Galveston on the 10th, and went back to Velasco on the 15th. This is shown by his own and Morrissey's evidence, and by that of others. (Clarke, 34, 36; Morrissey, 69; Burgess, 205.)

Therefore, not being in Velasco or near the ship on the 11th and 12th, he could not have inspired these cablegrams. Upon his return on the 15th he, no doubt, expressed himself as sharing the opinion of the master, of Lloyds' agent, and of all others whom the master spoke to on the subject.

The message sent on the 11th said: "Delay will cause danger of sand banking; also increasing cost of floating."

In the light of all the evidence and of the experience of others upon the same coast that prediction was as reasonably certain of fulfillment as anything in the future that is based upon warnings of the past; and so the cable of next day "fresh breeze blowing, vessel lying easy; making no water, afraid of sand banking up," was absolutely true, as all the evidence shows as to the recital of present facts, and the formation of a sand bank or bed was reasonably to be expected.

But, is it true that the captain acted upon what Clarke, or any one speaking for him had said, in sending these cables? Read his depositions. In the first, taken at Galveston right after the salvage, such a suggestion was not made. He did say, however, that he had received a cable to do the best he could to get her afloat and to consult Lloyds' agent, which he had done. (29.)

On November 9, 1894, he thus deposed at Norfolk:

Q. "Are you familiar with that coast?"

A. "I ought to be; I have driven all along it in a cart." (244.)

Q. "Did he (Clarke) tender his services then?" (Oct. 7.)

A. "For what the court would allow him."

Q. "You got your instructions from the owners?"

A. "Before I received any word from the owners, Lloyds' and I put our heads together, talking it over and then advertised for tenders." (242.)

He is still silent with respect to Clarke's having misled him, or having unnecessarily caused apprehensions as to the vessel becom-

ing imbedded in the sand; but his deposition was taken a third time, and on December 8, 1894, at Galveston, for the first time he intimates that he relied upon Clarke's opinion (expressed on October 15.) (205.)

We give a part of his examination:

Q. "Were or not the communications (the cables above referred to) you had with your owners based upon information that you got from Mr. Morrissey and that you could see personally there?"

A. "What I communicated to my owners was my own opinions and Mr. Sorley's" (Lloyds' agent). (197, foot of page.)

Q. "Did Mr. Morrissey say anything to you about the danger of the sand banking about the vessel where she had stranded?"

A. "I can't remember his saying anything about the sand banking around the ship." (198.)

Q. "When you communicated with your owners, did you or not give them to understand she was in a worse or better condition than she was really in?"

A. "The first cable I sent told that the vessel laid easy and gave the position and distance from deep water; then, afterwards, I wired them that there was every probability of a bank forming around the ship, which was my opinion." (199.)

Q. "You relied upon Mr. Sorley's advice?"

A. "Certainly."

Q. "Did you consult with any other persons in regard to the vessel and the best mode of getting her off besides Mr. Sorley?"

A. "I spoke to Mr. Morrissey. He was like our agent."

Q. "Did you consult the pilots down there? You spoke to them in regard to it, didn't you?"

A. "Yes, sir."

Q. "Did you ask them about the danger of the sand forming about the vessel?"

A. "Yes, sir."

Q. "What did they tell you?"

A. "They told me that the sand would form around her if the wind came in strong."

Q. "What marine experience have you had?"

A. "About thirteen and one-half years." (210.)

Q. "Are you able to speak, Captain, from your own knowledge and experience, as to the tendency of sand along a beach such as this extending down to Velasco, to form around a stranded vessel?"

A. "Yes, I have known that." (210.)

Q. "You acted upon your best judgment, Captain, did you not?"

A. "Yes, sir."

Q. "Neither the pilots nor Mr. Sorley had any interest in this contract, did they?"

A. "No more than advising me what to do."

Q. "You have no ground for saying, and, as I understand, you do not say, that any of these gentlemen, the pilots and Mr. Sorley, misrepresented any matters to you, or intentionally gave you bad advice?"

A. "No." (215.)

It is manifest and not disputed by the evidence that Captain Burgess did not rely on the judgment or advice of any one person, but made the fullest inquiry and reached his own conclusion, which, however, was in perfect accord with the views of the insurance agent, the pilots, probably with those of the captains of the Whitejacket and Lizzie, one of whom witnessed his contract, as well as with the unanimous judgment of persons who had an

intimate acquaintance with the nature of the coast, the prevailing winds and the history of other strandings, or of such of them as were witnesses upon the trial.

Captain Clarke, while at Velasco on the 9th, offered to undertake the salvage for such compensation as the United States court might award if libellants were successful. This proposition the master refused, and, instead, under the advice of Lloyds' agent, called for tenders with the results shown.

After Mr. Sorley returned to Galveston the master, on the 12th, was instructed by claimants to accept the lowest tender, if lower impossible. He at once, on the same day, sent this wire: "Sorley, Lloyds' Agent, Galveston: Have received cable, accept tender forty-five eighty, please instruct Clarke if steamer not worth salvage salvors to take vessel in lieu of salvage. Burgess." (181, 191.) This is a direct notice intended to be given to Clarke that his offer was unconditionally accepted, and we lay stress upon it because a passage in the master's evidence, upon which claimants rely, would make it appear that Mr. Morrissey, Moller & Co.'s agent, had wired them that Clarke's bid was accepted before Burgess actually received the cable. If this were true, why should Burgess have also wired Sorley to inform Clarke of the acceptance of his offer—unconditional as to price? As to this matter Mr. Morrissey testified: "I told him when he showed me the telegram accepting the bid that I would telegraph Moller & Co." (49.)

Q. "Did the master himself show you the cable?

A. "Yes, sir." (49.)

Q. "The cable showed that it was received at Velasco at 1:40 p. m.?"

A. "Yes, sir."

Q. "And the proof shows that it was delivered to the master about 2 p. m., and that your telegram was sent to Moller with ref-

erence to the same matter at 2:15 p. m. of the same day—did you ever open any of those messages?" (Sent to Burgess.)

A. "No, sir." (50.)

The claim of claimants and their captain that the contents of the cable authorizing acceptance of the lowest bid, if lower impossible, were known to Morrissey, and that he had wired that Clarke's offer was accepted before Burgess received the message, is absurd and can not stand for a moment when all the facts are stated.

Bell, one of the claimants, testified that the cable was sent from Newcastle about 3 p. m. of the 12th; allowing six hours for the difference in time, that would have been about 9 a. m. at Velasco. Doubtless it was delayed in transmission, and had reached there at 1.45 p. m., as the operator testified, and was delivered to Captain Burgess and receipted for by him at about 2 p. m. Morrissey wired Moller that Clarke's bid was accepted at 2.15 p. m. Claimants' proposition is that at 8 a. m. of that same day, at least one hour before the message was filed in England, and nearly six hours before it reached Velasco, Morrissey knew of it and wired for Clarke. In other words, that he knew of it long before it was sent, possibly before it was written. This scarcely requires comment. The agent at Galveston shows that the message from Clarke to Burgess, stating that the contract price was agreed to, was filed in Galveston at 8 p. m., or, as the second file mark, that of the operator, shows, 7.59 p. m., the difference in time pieces accounting for the odd minute. (Smith, 172, 144.)

Morrissey's dispatch was received in Galveston that afternoon and Clarke answered it direct to Burgess that night.

Vaughan, the operator at Velasco, admits that it may be a mistake. That instead of a. m. it may be p. m. His record was lost. (121, 176.)

Morrissey testified that the captain received this dispatch that night at the hotel between 8 and 9 p. m. (51.)

The purpose of this contention of claimants is to make it appear that the master had no opportunity to make a better bargain, as Clarke, knowing his instruction to accept the proposal, if lower impossible, naturally refused to take less. But, as we have seen, Burgess wired Lloyds' agent an unconditional acceptance of Clarke's offer with a request to inform Clarke. (191.) Hence it is plain that he did not then try to get lower terms from Clarke as the latter had already informed him, in effect, that he would not do it for less when he made the bid. (205.) Again, he wired charterers at Galveston on the 14th if Clarke could not come to send some one else at same price. (190.)

THE SITUATION OF THE ELFRIDA, HER PERIL, PRESENT AND PROBABLE, THE SHORE WHERE SHE WAS STRANDED, THE EXPOSURE TO WINDS AND SEAS AND THE EXPERIENCE OF OTHER VESSELS WERE SUCH AS TO JUSTIFY THE APPREHENSIONS OF THE MASTER, WHICH HE CABLED TO THE OWNERS.

M. P. Morrissey, who lived at Velasco, testified:

Q. "What is the nature of the shore along there?"

A. "Quicksand."

Q. "What is the tendency of a body resting upon the sand, especially where the waters cover it, with respect to its remaining in its position or settling in the sand?"

A. "It would settle, because the sand would move around with every tide. The sand there is always shifting and moving."

Q. "Have you ever had any knowledge of a body or substance sinking in the sand there?"

A. "Yes, sir." (52.)

A. D. Smith, formerly a ship master, and for many years a pilot on the Galveston bar and familiar with the coast, was asked:

Q. "Does the position of a vessel become more critical or dangerous or less when beached?"

A. "It becomes worse."

Q. "Will you state whether or not there is any reason to expect sand to form around a vessel lying on the beach for a number of days?"

A. "I have known them to wallow in the sand and make a bed for themselves; the sand forms around them like a hog wallow." (74.)

In describing her launching, A. Coveney, the pilot, said: "The sea was coming in and she was well in her bed and would come out by jerks of about an inch at a time." (85.)

Captain Wm. Scrimgeour, a pilot of twenty-four years' experience upon this coast, was asked:

Q. "What would be the danger of a formation of sand around the vessel?"

A. "If the vessel is on the bottom and there is a sea or current running at all and the ship was lying so the current would sweep upon her, sand would bank up on the side the eddy is on. I have seen it bank up so that you could walk upon it. A change of the current would cause it to disappear from that side and fill up on the other side. These sands move with the current."

Q. "It is fine, movable sand?"

A. "Yes, sir. The water is thick with it." (92.)

Captain W. A. Hutchings, for thirteen years superintendent of the Eighth Life Saving District, embracing the coast of the United States upon the Gulf of Mexico, explained the sometimes peculiar action of the sand. One stranded steamer made a circle of 600 feet in the sand and at other times vessels would lie in their beds of sand. Sand is moving here all the time. (98.)

Q. "Do you know of your own experience that this sand will sometimes bank up and at times will wash away again?"

A. "Yes, sir."

Q. "If the sand bank up in one direction and you should get a wind and sea from right angles, it would remain there banked?"

A. "Yes, sir." (102.)

"The surf in nine feet of water breaks very viciously and it would have a tendency to lift her stern and drive her up the beach, from the simple fact that this sand becomes liquid, and with any motive power the sand gradually is displaced and the vessel works herself in and forms a bed for herself. She goes gradually and gradually to the shore and makes a bed for herself." (103.)

Captain James McDonald, another old ship master, who went to sea from 1852 until 1874, and since then has been a pilot on this coast and knows it well (107), testified that the sand would bank first upon one side and then upon the other of a vessel with head at right angles to the shore, as the Elfrida was, which would be caused by the litoral currents, and whenever the sea came in heavily she might go in broadside. (113.)

He shows how the breakwater at Galveston settled about seven feet in the sand, and that where there used to be nine or ten feet of water 200 acres of land have been made by the force of the currents. (113.)

Captain F. Johnson, a pilot on the coast of Texas, and at the mouth of the Brazos river, testified that the Elfrida was in danger of going higher up. That the water was only five feet deep at her port hatch. That a vessel lying in that position one current and sea might bank sand around under certain parts of the vessel and wash it away from another part of the vessel, which would strain the vessel and be apt to start her plates. (115.) Then the sand would enter and she would settle down.

He was on board the tug Josephine five and one-half days while

preparations were being made and the Elfrida was taken off. This witness was asked:

Q. "Did your own opinion correspond with the advice of the masters of the other vessels as to the necessity for prompt action?" (In taking off the Elfrida.)

A. "Yes, sir. Where that vessel struck there is only two feet of water to-day."

Q. "Why is that?"

A. "Sand banked up."

Q. "Caused by the jetties in that neighborhood?"

A. "Yes, sir." (119.)

AS TO THE EXPERIENCE OF OTHER STRANDED VESSELS.

Captain A. D. Smith testified as to the loss of the ship William, which was well up on the beach, bow on, and as soon as she began to float they undertook to turn her and she struck again and beached and became a total loss. She was of 1000 or 1200 tons. (72.)

The bark Flora of about 600 tons was successfully taken off.

The Francisca worked some distance through the quicksand and was, after twelve days' stranding, floated in a badly damaged condition. (78.)

Captain Wm. Scrimgeour told of the iron steamer Alabama, about 400 tons, which went ashore and was gotten off badly damaged with her back broken, after much trouble and expense. (93.) R. Ross testified to the same effect. He worked on the Alabama. Made three attempts to get her off. (124.)

The Australia, an iron steamer of 2000 tons, went ashore near Velasco and the Merritt Wrecking Company, of New York, brought down a plant and got her nearly off, but a gale of wind

came along and blew her upon the beach again and they had to go all over their work. (Scrimgeour, 94.)

Two iron steamers, the Arcadia and Carolina, were total losses by stranding, but no effort was made to get them off. (94.)

Wm. A. Hutchings, life saving superintendent, testified to the loss upon this coast of the Laura R. Burnham and the Ella Elliott, wooden vessels, both of which settled in the sand and *entirely disappeared.* (100.)

The ship William, the schooners Odessa and Welcome, the bark Abeona and others were all lost by stranding. (Ib., 96.)

The steamer Aransas, about 900 tons, stranded and was seriously damaged.

The San Marcos stranded, but was taken off. (100.)

This witness stated that if an iron vessel pounded any length of time the rivets would start, and then she would be in a worse position than a wooden vessel. (100.)

Captain J. McDonald told of the loss of the bark McDowell by stranding near where the Elfrida went ashore. (108.)

He also told of the Australia (see Captain Scrimgeour's evidence, *sup.*), and the bark Houston. The latter was taken off and a gale of wind came on and she went ashore again and broke her back. Mr. Hunt, who bought her, spent about $30,000 to get her off, but finally lost her, a total wreck. (107.)

Captain McDonald, on cross-examination, recalled the stranding of several iron steamers, among them the steamer Reindeer, which was lost on St. Joseph's Island. The others were saved. (110.)

Captain Burgess, in his second deposition, was thus examined:

Q. "How near was the vessel from the beach?"

A. "About three to four hundred feet."

Q. "How far was she from the breakwater?"

A. "She would be about the same distance, as near as I can judge."

Q. "About how deep was she in the sand?"

A. "She was about two feet; at the stern the most." (243.) (Ross, 123.)

Robert Ross, a witness for libellants, and who had been a seafaring man, knew the coast well and was at Velasco when the Elfrida stranded, testified that she was in a dangerous position. That she was likely to start leaking by thumping and starting her rivets, and then would *sand up*, which generally results in a total loss. (123.)

Captain F. Johnson, one of the pilots at Velasco, testified that the Elfrida, after going ashore, was nearly parallel with and about three hundred feet west of the west jetty, and that her stern was in line with the visible end of it and of the east jetty, which was 500 feet from the west, and was out of water one foot for about one hundred feet further out. There was some strong winds while she laid there. He tried to go alongside of her with a tug, but could not. (114.)

She was four or five hundred feet from the beach and four hundred feet seaward from her it was eight feet deep and five feet at her port hatch. Under advice of the captains of the White Jacket and Lizzie, Captain Brock ran out kedges when she first grounded, but they would not hold, neither would an anchor that Brock put out. She was in danger of going higher up. (115.)

The sand banking at one part of the vessel and washing away at another part would be likely to strain her and start her plates; she would then bilge and the sand would enter and cause her to settle. That a southeasterly wind, which was the prevailing wind, would probably drive her higher upon the beach. (116.)

Bad or stormy weather could reasonably have been anticipated at that time of the year. (117.)

The log heretofore quoted verifies this testimony as to rough weather.

Captain A. D. Smith, called for libellants, testified that he considered the situation of the Elfrida very serious. It could not become better and it might become worse. In the event of high winds or stormy weather, she would be liable to damage or total loss. Such winds would prevent them from working on her or running anchors. She might go higher upon the beach and sustain a total loss, as has occurred upon this beach. (72-3.)

A storm or heavy blow was to be expected in October. (74.)

The worst winds were from the east and southeast. (She was beached by an east wind.) (75.)

When stranded vessels are in quicksand, they always have a tendency to work in. They never fail to do that when you have a current. (80.)

The jetty would be no protection with the southeast wind, or with any wind around southward to the west. (81.)

McDonald swore: The weather is uncertain in October. We have had hurricanes in that month. (107.)

If the sea and storm rose sufficient to drive her up it would be harder to get her out to deep water. (111.)

Coveney testified: It was an east wind that took her up. If the wind had gone to the southwest the sand would have probably banked or thrown her broadside on the beach. (88.)

The tide was much higher than usual when she was taken off. The probable effect of an equinoctial gale would have been a total loss. (89.)

After she went over the jetty she lost two kedge anchors and a bow anchor and fourteen or fifteen fathoms of chain. (90.)

Captain Scrimgeour testified as to the prevailing winds in October being eastwardly and southeastwardly. (91.)

He was asked: "Suppose the vessel is grounded and is in, say,

five feet and one-half forward, taking an average tide, and seven and a half feet aft, and the vessel's draught is eleven feet, ten inches, and she is settled in the sand about two feet, would she or not be in a perilous condition?"

A. "If there was a big tide and a gale it would bring the vessel in higher on the beach, and in doing that the vessel would likely go to leaking, and then she would sink with the sand."

Q. "And then what?"

A. "It is a hard matter to do anything at all with them then, and we generally give them up."

Q. "As a total loss?"

A. "Yes, sir." (92.)

"I would not consider her safe as long as she was on the beach." This the witness stated in answer to the question as to the effect of reducing her draught from 11.10 to 10 feet by putting out ballast, and further, that it would be necessary to procure prompt assistance to get her off in case of a heavy gale. "October is the windy month up to about the 20th." (92.)

The heaviest winds are south and southeastwardly. (95.)

Captain Hutchings testified as follows:

Q. "Under what conditions would she be lost?"

A. "Such as a heavy southeasterly wind. I would say she was in a precarious condition, liable to be bilged by lifting up and down and filling with sand. That is probably the most dangerous position. As long as you can keep them tight there is hope, but when the vessel commences to rise up and down, she settles very rapidly in the sand, especially if the surf is heavy, and in time she will go out of sight, while wooden vessels break up and go to pieces."

Q. "What, if any, is the necessity for prompt action where the vessel is stranded 1000 feet from deep water sufficient to float her?"

A. "Placing myself as captain of the vessel, I would be in grave apprehension as soon as she struck and would use every means to get her off as soon as possible. I believe that every minute a vessel lays on this beach enhances the danger. There is no time to delay. Even an ordinary fresh breeze causes a good surf on this beach. An ordinary breeze blowing twenty miles an hour, which is considered a strong breeze, and the wave action will break up a vessel or drive it up higher on shore." (97.)

To the same effect was the testimony of Captain Johnson, the pilot. (116.)

The wind record at Galveston (253), forty miles distant, shows an east wind on October 6th, blowing a maximum of 18 miles per hour.

On the 8th, a north wind, with a maximum of 33 miles.

On the 10th, a southeast, with a maximum of 15.

On the 11th, a southeast, with a maximum of 18.

On the 12th, a southeast, with a maximum of 12.

On the 13th, a north, with a maximum of 24.

And on the day she was taken off, the 17th, the wind was southeast, with a maximum of 9 miles per hour.

On page 146 of the record is given a table showing the winds for each month, compiled for twenty years, official records of Galveston. It appears from that that the prevailing direction in October is southeast. The average hourly velocity is ten miles and the highest hourly velocity is sixty miles, and that it is the same in September, fifty-three maximum in August and fifty-four maximum in November.

AS TO THE PREPARATIONS MADE BY SALVORS, THE NATURE AND VALUE OF THEIR PLANT AND APPLIANCES, AND THE WORK DONE AND RISK INCURRED BY THEM.

Captain Clarke prepared and equipped two tug boats, the Seminole and Josephine. He had two schooners, the Lewis Dolson and the Dixie, to bring down the large wrecking anchors and a month's supplies from Galveston, and he hired two barges at Velasco, for one of which he agreed to pay $6500, if it should be lost in the service. The schooners could not perform the work. Two of his anchors weighed 7000 pounds each. He employed between twenty and thirty men. (Anderson, 124; Clarke, 36, 38, 39, 43.)

The anchors, hawsers, etc., were transferred from the schooners to the lighters. (44.)

Q. "How many did you have in your service altogether?"

A. "One day we must have had thirty-five men."

Q. "What provisions did you take—supplies for your men—for what period of time?"

A. "For a month. I took plenty of everything."

Q. "Did you expect to be engaged a month?"

A. "I did not know how long. I did not think I would be so lucky." (44.)

Q. "Then you took four vessels there—two of your own and two which you hired?"

A. "Yes, sir."

Q. "And you hired two barges there?"

A. "Yes, sir." (44.)

The schooners could not be used on account of their draft and the rough seas, and hence the barges were secured. One of them and one of the tugs were used in planting anchors and towing, and the others were at hand if needed. (Clarke, 36 to 43; Scott, 226.)

Captain Johnson, a pilot, and who also had charge of the steam tug Seminole, testified that the plant which Captain Clarke had was worth from $35,000 to $40,000. (116.)

They were engaged three days and a half (from time of leaving Galveston) in getting everything in readiness to take the Elfrida off, in running anchors and hawsers. He (Clarke) had one of Mr. Brock's lighters there and a derrick barge which belonged to the syndicate, under Captain Brock's control. (116.)

Captain Clarke, upon his second trip to Velasco, which was on October 15th, the day of signing the contract, found that he could not use the schooners which he had for putting down anchors with which to heave off the steamer, and he hired a lighter from Fred Brock at Velasco, who had bid for the contract at $24,000, and also obtained Brock's assistance and that of eight of his men in working on the lighter and getting out anchors and chains. Clarke guaranteed the safe return of one of the lighters, worth $6500 (it appears that two were engaged), but it was found that one was sufficient for the work. He used four anchors, two of his own and two of the steamer's, which were taken off of her bow to lighten her. (38-9.)

On page 40 he describes how the hawsers and cables led from two large anchors to the port quarter, one to the starboard quarter and one leading forward from anchors, and all carried to the winches. The anchors astern were place at about fifteen hundred feet from the vessel. (45.)

They were at work placing the anchors two days, and on the afternoon of the 17th, in about four hours' heaving, the vessel was hauled off, the principal difficulty being in getting her started. She was about one thousand to twelve hundred feet from water of sufficient depth to float her. (44, 45.)

She was then taken in tow by the tug.

The pilot, A. Coveney, also described the salvage substantially

the same. The vessel's engines and winches were used in heaving on the hawsers. It was some time before she started. "A mighty slow start. The sea was coming in and she was well in her bed and would come out by jerks of about an inch at a time." (85.)

She had settled two feet deep in the same. She was on a line with the seaward end of the jetties, but was not protected from the southeast winds. (89.)

The chief mate of the Elfrida, Peter Scott, testified that they pulled on her perhaps a half or three quarters of an hour before she moved.

Q. "Did she come along gradually and easily then?"

A. "She came along with sudden jerks; we could feel her. There was a jerk and a stop and then another jerk. They pulled at her three or four hours before she was floated." (226.)

The witness Hutchings testified that judging from the salvage work Clarke had done his was the most complete plant and equipment along this coast. (104.)

The plant was exposed to some risk, although the weather was fine.

In answer to the question regarding risk, Pilot Johnson says: "His (Clark's) tug was exposed to risk. I was on her myself at the time. He asked me to get on the tug as I was more familiar with the place than the captain and she was thumping hard." (116.) He took her close to the stern of the Elfrida in taking the lighter in as close as possible, and the pounding of the tug made him apprehensive that she would break to pieces.

He states that both Brock's lighter and derrick barge were used, and the lighters ran anchors and cables. (116-117.)

Captain J. Anderson, sworn for libellants, also testified to the fact that Clarke had laid in a supply of provisions for about five weeks, had hired his schooner and the Dixie to carry down men and plant. He had from twenty to thirty men. (124-5.)

Captain Burgess, for claimants, testified: That salvors were two days laying anchors, and about three and one-half hours pulling her off. (208.)

That Captain Clarke had suggested to him when the vessel first stranded that he would salve her for what the United States Court would allow, which the master refused, and Clarke offered to lend him his tackle. (209, 243.)

On 243 he swears that he had 140 tons of coal aboard, enough to take him back to Newport News, and yet Morrissey (53) deposes he had to buy coal at Velasco and had only from fifty to sixty tons.

Burgess says the ship was two feet deep in the sand, and on the same page (243) he expresses his individual opinion that a bank of sand would have formed around her, that "after pumping out ballast and working the engines, we worked her loose and raised her that much."

VALUE OF THE ELFRIDA.

Captain Burgess was examined upon this point thus:

Q. "What was the value of that vesel?"

A. "About £22,000."

Q. "That is inclusive of her engines and machinery?"

A. "Yes, sir. That is as near as I can get to it. It might be less, as they diminish in value all the time."

Q. "That is your best judgment?"

A. "Yes, sir. As near as I can give you." (213.)

Thomas Bell, one of the owners, testified: "A boat of her size, type and tonnage could have been bought new in October last for the sum of £20,000, and deducting from this amount 6 per cent annual depreciation, I arrive at the Elfrida's value as £14,000 after being salved at the latter part of October, 1894. At the time of her stranding she was insured for the sum of £18,000, but we

have since reduced the value to £16,000. These amounts are book values only and have regard to the fact that she was bought at a time when steamship tonnage was 15 per cent dearer than during the past six months." (148.) He still fails to explain how, if the vessel was worth only £14,000 at the outside figure, he still carried an insurance of £16,000.

One of the witnesses, J. Moller, however, thus deposes:

Q. "How much are they (vessels) generally insured for relative to their value?"

A. "No one insures a vessel to her full value unless he wants to lose her; then he will make it as high as possible."

Q. "A vessel insured for £18,000 may be presumed to be worth £20,000?"

A. "That is a very hard question to answer. I am familiar with it in the abstract sense. A vessel insured for £18,000 is supposed to be worth it." (134.)

The value of the vessel should not be a controlling element in this case, but we mention it because the vessel was undoubtedly insured and her insurance comes nearer representing her true value. It is a matter of common knowledge, and this record discloses that the rating given by Lloyds' and other insurance organizations is based upon actual value, and it is not likely that this vessel would be allowed to carry an insurance of £18,000 unless in the judgment of the insurance surveyors and inspectors she was regarded as worth that amount at the very least, and probably more. Nor does Mr. Bell account for his alleged 6 per cent annual depreciation, nor explain that it is actual or estimated, or that it is the established and accepted depreciation in the shipping market. For aught that appears, it is a deduction of his own, made without any facts to support it, at least to the amount that he claims. The vessel was built in 1889; at least five years deprecia-

tion would reduce her value at that rate 30 per cent, which is scarcely likely.

ASSIGNMENT OF ERRORS.

Petitioners assign error in the decree and decision in this cause of the Circuit Court of Appeals in the following particulars:

1. For that the said court in the majority opinion considered the question of compensation without sufficient regard to the contract that had been fairly and deliberately made between the parties, dealing with the question as one of the proper measure of compensation for salvage services independently of a contract.

2. For that said opinion held that the compensation for salvage stipulated for by the contract and allowed by the District Court was excessive to such an extent as to be unreasonable.

3. For that the court held that the master and owners of the Elfrida accepted the contract with the understanding that they had no other option; libellants had offered when the ship first stranded to perform the service for such sum as the court might allow, and other relief could have been had from New Orleans if not from Galveston.

4. For that the only ground upon which the amount of the salvage contracted for can be claimed to be excessive is because of the signal success of the salvors within the time employed, which fact is not sufficient of itself to avoid the contract.

5. For that the court held that the amount was excessive in view of the outlook and apparent conditions existing before and at the time the contract was made.

6. For that the court gave no consideration whatever to the risk that salvors assumed under the twenty-one days' limit, in which time their work might have been prevented, interrupted and delayed by casualties, or winds, or seas, and they have received no compensation whatever, although at the end of the twenty-one

days they might have brought the vessel to within a few feet of floating.

7. For that the court held that the danger of the Elfrida was greatly exaggerated. The record does not sustain this.

8. For that the court did not follow the rule announced by this court that a contract for salvage service and compensation will be enforced where the salvor has not taken advantage of his power to make an unreasonable bargain.

9. For that the court annulled the contract because the compensation appeared excessive in the light of the time and work actually employed; whereas, the judgment of the District Court should not have been set aside unless the compensation was so grossly excessive as to shock the conscience.

10. For that the court held that the contract should be set aside because the execution of it turned out more easy than was anticipated at the time it was made.

11. For that the court held that while the vessel was stranded and the wind was blowing on shore, the maximum velocity was fourteen miles an hour. The record shows eighteen miles directly on shore. Another day, twenty miles from the eastward, and the wind from this direction drove the vessel ashore. Twenty-four miles another day from the northeast, which caused a heavy surf.

12. That the court did not attach sufficient importance to the log of the Elfrida and the testimony of the master which showed the exposure, danger and risk.

13. For that the court held "that on the whole it appears from the character of the bottom, the smooth water and gentle winds which are to be expected in that soft climate in a month notable for its mildness, that the Elfrida was in little danger," while we contend that the evidence shows that the bottom was quick-sand in which vessels had sunk and disappeared. The waters were not

smooth; on the contrary, even a wind parallel with the shore would cause a heavy surf, nor were the winds gentle. October was a month of storms and tempestuous weather, and was not notable for its mildness.

14. For that the court found that the Elfrida was at no time seriously imbedded in the sand. The evidence shows the sand formed banks or washed away with the currents, and that she was working into the sand.

15. For that the court held that the owners of the ship were ignorant of her true condition. If the cablegrams did not inform them, the letters of Burgess and Moller must have done so, and there was time for them to have been received in due course of mail before the vessel was taken off.

16. For that the court found that the Elfrida was worth only about seventy thousand dollars. She was insured for much more than that and the evidence of her master shows that she was worth something in excess of the insurance, or about one hundred and ten thousand dollars in all.

Wherefore, libellants pray that a decree be entered in their favor for the compensation provided for by the contract, with interest thereon at 6 per cent per annum from October 24, 1894, the date of filing the libel in the District Court.

POINTS AND ARGUMENT.

I.

WHEN A SALVAGE CONTRACT HAS BEEN FAIRLY ENTERED INTO AND THE SALVOR HAS NOT TAKEN ADVANTAGE OF HIS POWER TO MAKE AN UNREASONABLE AND INEQUITABLE BARGAIN, THE FACT THAT THE COMPENSATION MAY BE DEEMED EXCESSIVE, ON ACCOUNT OF THE WORK HAVING BEEN

PERFORMED IN LESS TIME AND WITH LESS TROUBLE AND EXPENSE THAN WAS EXPECTED, WILL NOT JUSTIFY SETTING IT ASIDE, AS THE PARTIES HAD THE RIGHT AND WERE PRESUMED TO TAKE INTO CONSIDERATION ALL THE ELEMENTS OF UNCERTAINTY AND THE INTERESTS AT STAKE IN MAKING THE CONTRACT.

To avoid the agreement, such excess must appear to be so grossly disproportionate to the nature and result of the work, the value saved, the uncertainties, risks and outlay incurred, and the means employed in the undertaking, as to render the agreed recompense unconscionable.

In a case where there was no contract the familiar principle is thus laid down:

"The action of the court in allowing salvage is one involving judicial discretion and an appellate court will not set aside the result of the exercise of that discretion by the trial court unless it has been manifestly abused; or unless, as Chief Justice Marshall expresses it in The Sybil, 4 Wheat., 98, the award of the District Court is so grossly excessive as to shock the conscience of the appellate court.

The Comanche, 8 Wall., 448.

Hobart v. Drogan, 10 Pet., 108.

The Phoenix, 62 Fed., 487.

The Connemara, 108 U. S., 359.

The Florence, 71 Fed., 527.

The only point for discussion in the case, therefore, is whether the allowance by the court below was grossly excessive and not whether, if we had been sitting in the trial court, we would have fixed a somewhat less amount."

The above is taken from the opinion of the Court of Circuit

Appeals of the Sixth Circuit, delivered by Judge Taft in the R. R. Rhodes, 82 Fed., 751.

It must be borne in mind that this is not a question as to the proper amount of an award in the absence of a contract, but as to the validity of a contract fairly and deliberately made, after the fullest opportunities for investigation, and in full communication with owners and other salvors, and unless such a contract so made provides for compensation out of reason and proportion to the services rendered, the chances taken, and the property saved and restored to the owners, the contract must, under the authority of this court and the almost unbroken current of decisions elsewhere, be given the effect that the parties agreed and intended it should have when made, although such amount may exceed the sum that an admiralty court would have awarded for the salvage had there been no contract.

There is a wide range in the judgments of courts in making salvage awards where there are no contracts, and it can be safely said that no fixed rule or uniform scale has been found directing the court to a certain and satisfactory result in every case; hence, for this reason, in addition to the fundamental rights and obligations of the law of contracts, the principle is recognized and followed that an agreement for salvage compensation will be given effect unless totally contrary to justice and the equity of the case.

Let us examine briefly the element of uncertainty.

This entered into the contract as has been well stated by Circuit Judge Pardee: "At that time (when the contract was made) according to the evidence, all parties thought the matter of floating the Elfrida would be a difficult and tedious work, necessarily taking time and accompanied with great risk of success. That the master and owners so believed is shown by the fact that they required the salvors to do the work in twenty-one days and stipulated for the option to abandon the ship in lieu of paying the sal-

vage agreed upon, and that the contractors so believed is shown by the extensive preparation made to carry out their contract. The contracting salvors prepared a month's supply for their force, procured cables, gear, chains, anchors, two tugboats, lighters and two schooners, fully manned and equipped, and hired a large force of men," etc. (275-6.)

He further says: "Our inquiry should be, to-wit: as the circumstances were at the time the contract was entered into between the owners and salvors of the Elfrida, did the salvors take advantage of their power to make an unreasonable bargain? Or, in other words, was the amount of salvage contracted for excessive in proportion to the value of the property salved to such an extent as to be unreasonable?" (274.)

The witness, Captain A. D. Smith, whose testimony to the effect that "almost anything may be taken off the beach; the question is whether it is worth it," was relied upon by claimants and by the Circuit Court of Appeals, which set aside the contract and awarded salvage in accordance with claimants' contention. This witness, however, was immediately examined further as to whether or not the cost of getting a vessel off could be determined in advance.

A. "That would be difficult to do."

Q. "Is not that very problematic as to the time, labor and cost?"

A. "Yes, sir. You have everything to contend with. Sea, weather and everything else. In taking a vessel off the beach you might have everything ready to get her off, and then bad weather might set in and you would have to stand by and see everything busted up and it would have to be done over again."

Q. "It is contingent upon the weather and circumstances?"

A. "Yes, sir. The weather is the principal thing to consider. You can not do anything in bad weather and the condition of your

vessel is then much worse. You have to abandon your work during bad weather."

Q. "Can there be any reasonable determination in advance how long it would take to get a vessel off?"

A. "It can not be determined in advance. It is a pretty risky thing to say how long it will take to get her off." (74.)

In our statement of the case will be found much more evidence confirmatory of the foregoing.

Thus it was that Captain Burgess provided a time limit of twenty-one days, and the injustice of setting aside this contract is manifest when we consider that the winds and seas might have prevented Clarke from accomplishing his undertaking within the time allowed, or might have interrupted and delayed him, and heavy weather have borne the ship farther up, or sunk her deeper in the sand. This very uncertainty was a factor necessarily taken into consideration in fixing the contract price. In the light of the history of previous wrecks, the instability of the weather in October and the shifting sands, it was not unreasonable to expect that the task might have been delayed and the twenty-one days entirely consumed without complete success, although the vessel might have been drawn to within a few feet of deep water. Then when the time ended, salvors could claim nothing and the master could have her heaved off the remaining few feet at a small cost. Other vessels had required much longer time than that to float them, and the Elfrida might have received the benefit of Clarke's labor and skill to the verge of floating and he would receive no compensation whatever. The time limit was onerous upon him and justifies larger salvage. In an ordinary case of salvage there is no such limit imposed.

As remarked by Judge Pardee the master called for competing bids, received more than one and accepted the lowest in a contract

which fully protected the owners and threw all the risk on the salvors with a time limit.

Is not such a condition also one of the ingredients of the consideration which should not be ignored?

As Judge Brown held in the Alert (S. D. N. Y.), 56 Fed., 721, where the defenses were that the salvage contract was excessive and exorbitant, and made under a mutual mistake of fact, namely, upon the supposition that only a small amount of cargo was on board, it was not a case of mistake, but only uncertainty as to the amount of cargo, and *this element of uncertainty was in the minds of the parties before the contract was signed, "and it was made in view of that very uncertainty."*

In the case at bar the agreement was entered upon in view of the very uncertainty as to how long it would take and by what means the Elfrida could be salved. All of this depended upon several matters; upon the condition of the weather, of the steamer herself, the bed in which she lay and upon the winds, currents and tides, upon storms and calms; in brief, upon many contingencies which the parties could not pre-determine, and which, as all cases of stranding along this coast taught them, rendered the salvage of the Elfrida extremely uncertain, both as to time, means and cost, if in fact it could be accomplished at all.

As Judge Brown further observed in the Alert, where the recovery was fifty thousand dollars, or fifty per cent of the value of the cargo and vessel:

"Looking at all the circumstances, as they existed and were appreciated at the time when this contract was made, both as regards the ship and cargo and the *interests, risks and reasonable apprehension of all parties*, I think any interference by the court with the enforcement of a contract so fairly and deliberately made and executed as this, would, as a matter of general policy, be productive of more harm than good." (Italics are ours.)

The Alert went ashore upon a sloping coast of soft, yielding sand. She was high up on the beach with only about six feet of water around her, except in the bed or cradle in which she lay. She was moved a short distance, but the hawsers broke and she went back head on to the beach. Upon a second attempt, after heaving ten hours, she reached deep water undamaged. She did not leak.

Note how analogous in many of the circumstances of coast, depth of water, length of time in heaving off, the undamaged condition of the vessel, the sand bed in which she lay and the element of uncertainty, is that case to ours.

It is there held that it is the right and the duty of a court to examine into the fairness and reasonableness of salvage contracts, yet it is shown that the rule requiring such scrutiny and the reason therefor have reference to contracts made at sea, in peril and under the pressure of immediate necessity. "But these considerations are applicable but slightly, if at all, to contracts which, like the present, are made upon land, between the parties dealing upon equal terms, with full opportunity for deliberation, with equal knowledge of the facts and under the ordinary conditions of non-maritime contracts. Such contracts should be treated like other voluntary, deliberate contracts for a specific service." Citing:

Bondies v. Sherwood, 22 How., 214.

Agnes I. Grace, 49 Fed., 662, and 51 Fed., 959.

The Great Northern, decided by District Judge Hughes, E. D. Va., 72 Fed., 678, deals with the question as to estimating the value of a salvage service by the circumstances prevailing at the time the services were entered upon, and by the conditions and casualties which experience teaches are liable to happen in the ordinary course of events while the service continues, and the fact that the weather and sea afterward proved favorable is not a reason for diminishing the award. Judge Hughes quoted from the Strath-

garry (1895), Prob. 264, which was a case in which a sum was agreed upon between salvor and salved before the service was undertaken.

The high court of admiralty, Bruce, J., said: "In forming an opinion of the fairness or unfairness of the agreement, I think the court must regard the position of the parties at the time the agreement was entered upon. The agreement can not become fair or unfair by reason of circumstances which happen afterwards."

The Agnes I. Grace (C. C. A., 5th Cir.), 51 Fed., 959, affirming 49 Fed., 662, is very similar to this case and ought to be a precedent. Its main features illustrate and sustain our contention and Judge Pardee's dissent. It quotes with approval Dr. Lushington in the Helen & George, Swab., 368, and the plain rule declared in the British Empire, 6 Jur., 608, in these words:

"When there has been a definite and distinct agreement, with ample time for the parties to consider what they are doing, the court would be reluctant to interfere with it." And also, the Supreme Court, in Post v. Jones, 19 How., 150: "Courts of admiralty will enforce contracts made for salvage service and salvage compensation, where the salvor has not taken advantage of his power to make an unreasonable bargain."

This schooner was stranded and in danger of total loss. The master was helpless but thoroughly conversant with the situation and circumstances, and had ample time and opportunity to make such investigations as were necessary to enable him to procure assistance. After full consideration, he entered into a contract which he regarded as favorable as could be made. The agent of the underwriters at Savannah visited the schooner while on the bank, after the agreement had been made, and it does not appear that he made any objections to the terms of it. The master had every opportunity to solicit assistance.

The court say: "This case can not be considered as belonging to that class of cases of contract for salvage service where the master being upon the high seas, or on an uninhabited coast at a distance from all other aid, is absolutely helpless and without power to procure assistance other than that offered, and compelled in consequence to make a hard and inequitable contract."

"*Before the performance of the services the agreement appears to have been considered by all fair and just; and, if so then, it can not now be considered otherwise because of its successful rendition by appellees who had assumed all expense and risk. Although the amount given may, under the circumstances, appear high, in proportion to the value of the property saved, this court does not deem it sufficiently unreasonable to disturb the judgment of the court below.*" (Our italics.)

It is true that the Agnes I. Grace would probably have sunk in the sand sooner than the Elfrida, but, aside from this, their positions were, in many respects, similar. Almost the entire evidence in this case, based upon experience, justified the conclusion that the Elfrida would, before any other assistance could have reached her, have been driven further upon the shore, or would have been banked up by the sand, or would, by the violence of winds and seas, and by contact with the bottom have started her rivets, or broken her plates, and thus the sand have effected an entrance, causing her to settle more rapidly. Any of these contingencies and probable perils might befall her. It would have been many days before effective help from elsewhere could have reached her. Her position was one of daily, if not hourly peril. She had lost some of her own anchors and cables in unsuccessful efforts to heave off.

The master of the Grace had engaged to pay the salvor the sum of $5000, about five-twelfths of the value of the property saved, and the contract was held valid.

In Jones on Salvage (99), the English rule is thus declared:

"If a salvage agreement be proved, the court will uphold it, unless it be clearly inequitable; and it is no answer to the agreement to say that the bargain is a hard one upon the salvors; or that greater difficulties than were anticipated, in consequence of the change of weather, attended its performance; or that the weather became tempestous; or the vessel was longer in arriving in port than might have reasonably been expected. *Nor, on the other hand, can the owner of the vessel receiving assistance refuse to pay the amount stipulated for, on the ground that the salvage services were attended with less difficulty than had been anticipated, unless, indeed, the sum happen to be so grossly exorbitant as to amount to evidence of bad faith or fraud, which, of themselves, would induce the court to set aside the agreement.*"

In the Medina, 1 P. D., 272; 2 P. D. 5; Ken. Civ. Salv., 206, Brett, L. J observes: "I think that the old rule of the admiralty court ought not to be lightly encroached upon, viz.: that where there is an agreement made by competent persons and there is no misrepresentation of facts, the agreement ought to be upheld, unless there is something very strong to show that it is inequitable."

Kennedy on Civil Salvage, 212, thus condenses the doctrine of the more important cases upon this subject in England:

"But the court of admiralty does not set aside a salvage contract which appears otherwise unobjectionable, merely because in the circumstances as they have in fact happened it would, but for the contract, award as salvage a somewhat greater or somewhat less sum than that which the parties have agreed between themselves; or because it finds that one or other of the parties have agreed beween themselves; or because it finds that one or other of the parties might, as matters have turned out, have made a more prudent bargain. *It not unfrequently happens either that the services involve more risk or difficulty than the salvor has forc-*

seen, or, on the other hand, that they prove more easy of execution than the master of the ship to be salved when making the bargain has supposed that they would be. But if they were such services as were fairly within the meaning of the contract, the mere circumstances that the ease, or risk, or duration has proved to be greater or less than was expected when the contract was made, affords no ground for the court's interference with it. 'It is no argument,' said Dr. Lushington in The True Blue, 'against the validity of the contract, that in the first instance it was entered into under the impression that the service would be light, but that, in consequence of a change of weather or other circumstances of that nature, it subsequently became more onerous. It is the very nature of agreements of this kind to fix a stated sum as compensation for a stated service, and the parties who enter into the engagement take the risk of any circumstances which may, in effect, alter the extent of the stipulated service.' "

In the case of the Elfrida, the salvors took the hazard of a change of weather, of gales and storms, of the vessel starting a leak or going further ashore, and many other contingencies which might have delayed or prevented the work within the stipulated period of twenty-one days. Even the Merritt Wrecking Company had spent many weeks in taking off a vessel on the Texas coast. Others had been taken off, or partly so, when bad weather coming on, they were again beached and several wholly lost, as the evidence in this case fully established; so that there was much that was conjectural as to the outcome of this enterprise.

Clarke expresses it well when he says: "I did not think I would be so lucky." (Tr., 44.)

The Elfrida, as compared with other vessels stranded upon a lee shore, was singularly fortunate and this agreement for a specific sum is not to be lightly set aside when salvors fully complied with

it, saved the vessel, and took all the risk of great loss and expense upon themselves.

Sir R. Phillimore gave expression to the rule of reason and justice which we invoke: "But I feel not less strongly the duty and expediency of not allowing a contract deliberately entered into between perfectly competent parties to be set aside by either of them *because the execution of it has turned out more difficult or more easy than was anticipated at the time of making the contract.*"

Ken. Civ. Salv., 214.

The Sir William Armstrong (E. D. Va.), 53 Fed., 145, called for the application of the principles relied on by us. The steamer, with a cargo of 5559 bales of cotton, stranded on the shoals twenty miles north of the Virginia capes, and sent for assistance to Norfolk, fifty miles away. The Merritt Wrecking Organization, who were well equipped, in response sent two barges, two wrecking steamers and three or four tugs. The Armstrong was in water seven feet deep at low tide, and several feet in the sand, witnesses varying from three to ten feet. She had once floated off by the use of her engines and sails, but had fallen back and grounded again. The Merritts took off the cotton on barges. Their work was greatly favored by the weather, which was fine almost beyond precedent. They twice heaved her off. She was aground eleven days.

Before the salvage service began, salvors and the master of the Armstrong entered into a contract by which it was agreed that salvors should have the use of the material belonging to the vessel and the aid of the crew, and should receive for compensation 25 per cent on dry cotton saved, 40 per cent on wet cotton and 20 per cent on the value of the steamer, when saved. Claimants contended that this agreement was inequitable and exorbitant. Judge Hughes, in disposing of this question, and refusing to impair the obligation of the contract, remarks:

"It is well settled text-book law that the master of a vessel in distress may bind the owner by a salvage agreement in the absence of the owner; that it is competent for salvors, instead of leaving the amount of their remuneration to be determined by a court, to agree with the master of a vessel in distress to render the required assistance for a specific sum; and that, if a salvage agreement be proved, the court will enforce it, *unless it be clearly inequitable; it being no answer to an agreement to say, on one hand, that it is too hard upon the salvors, or, on the other, that the salvage services were attended by less difficulty than was anticipated.* It is just as well settled, on the other hand, that a salvage contract may, as any other contract may, be set aside on the ground of duress, or fraud, or deception, or gross exorbitancy, or other reason that may be pronounced sufficient by a court of justice." * * * Three days after the date of the contract the master telegraphed to his owners in England, informing them that he had made the contract, describing its terms, and they did not object, nor was there any evidence that during the whole period of seventeen days when the work of salving the ship and cargo was going on, that the master made any objection. This vigorous expression occurs in the opinion: "If a solemn contract, made under the most serious circumstances, like the one under consideration, could be repudiated at pleasure by one of the parties to it, on such a ground as that insisted upon here, no contract could be relied upon as binding, and all the law of contracts, affecting so largely the affairs of mankind as that law does, would have to be treated as an idle jargon."

The G. W. Jones (S. D. N. Y.), 48 Fed., 925, furnishes another example. As the steamer was leaving the wharf at Progreso her anchor, on which she was heaving, broke, and a strong wind caused her to strand broadside upon the beach. Repeated efforts were at once made, by heaving upon the lines leading to the wharf, to pull her off the beach, but without success. Several ropes were broken.

The sea was choppy; the wind fresh, and it was near high water. "There was no danger of wrecking, unless a northerly storm should come up, but the master deemed it dangerous to leave the vessel in that condition over night, *lest she should work higher up on the beach and deeper in the sand.*" He made a written contract with the master of the tug, and the defense was that the captain of the steamer was compelled to sign it by duress and compulsion, and had no authority from the owners, and did not communicate with them, which he might easily have done. The evidence showed that the apprehension that she would go higher was justifiable. "It was his duty, therefore, to procure any aid at hand that could be reasonably procured for the immediate relief of the steamer. His authority as master to secure this at once, without communication with the owners, is plain. The circumstances did not admit of delay, nor is there any rule of the maritime law that would require the master to obtain special authority in order to secure relief of this kind in an emergency."

"The evidence does not justify the defense of duress or compulsion. *The master was not at sea, but in port,* and had the option of procuring any different kind of relief that Progreso afforded. The tug was maintained there by special service, but this circumstance worked no constraint upon the steamer. * * * She (the tug) received no injury, however, and the steamer was got off without receiving any damage, whatever, and sailed for Boston the second day afterwards. I can not attach much weight to the evidence of the witnesses at Progreso that the steamer was not in peril. *Doubtless she was not in immediate peril of being wrecked, but the witnesses do not say that it was not perilous to leave her on the beach in her stranded condition, without attempting immediate relief.*" The contract was sustained.

Such contracts as the one now before the court have been sanctioned and upheld in this circuit. Where the parties are *sui juris,*

and there is no grossly disproportionate recompense, in the light of all the facts and probabilities, the court will require ship owners as well as others to observe the solemn agreements made by them or their representatives.

The R. D. Bibber, 33 Fed., 55, a schooner loaded with railroad iron, went ashore in Galveston bay. A contract for salvage for 50 per cent of the value was made. Wrecking crews and large pumps were used, and there was risk of serious damage to the property engaged in the work. The court held that the evidence did not warrant any finding that the Lighter Company acted otherwise than in good faith, or took any undue advantage of the master of the Bibber. What the company did was open, and the master could see for himself, and the contract was enforced.

In the case of the Hesper, 18 Fed., 692, so much relied on by claimants, there was no contract. It did not appear that the Hesper was so near a lee shore. There was no hazard to the persons or vessels aiding her to get safely off. There was some in our case, as will be shown. It did not appear that she was sunk in the sand. The salvage allowed was not upon a contract, and we submit that the best reason and authority require the maintenance of these contracts when not shown to be unconscionable, or obtained by fraud or duress.

The principle we invoke was applied *e converso* in Bondies v. Sherwood, 22 How., 214. There the libellants agreed to raise a sunken vessel in fourteen days, but it took them longer. The court held that by their own showing they could not recover under the contract, as they did not carry it out within the time stipulated, and further, that they could not, in repudiation of the agreement, libel the vessel for salvage. In other words, the court held them to their contract and refused to make a new one for them.

Harley v. 467 Bars Railroad Iron, 1 Saw., 2, announces the rule in this language:

"Parties may agree on the amount of salvage compensation, or on the principles upon which it shall be adjusted, and such agreements if fairly made and no advantage be taken of ignorance and distress, are readily upheld by the courts."

The court further remarks that in an undertaking of this kind much is conjectural and salvors necessarily take chances.

Justice Story, who went as far as any one in the scrutiny of salvage contracts, thoughtfully observes:

"The situation of the parties, the nature of the service and the absence of all controlling necessities requiring immediate relief on one side, at any expense and hazard, in order to escape from impending perils and calamities; and, on the other side, the absence of any duty to lend the required assistance, or any motive to take advantage of the necessities and urgencies of those perils and calamities to drive a hard and unconscionable bargain, make it a case where the court not only looks with indulgence upon such a contract, *but endeavors to fortify itself against the exercise of mere discretion* by adopting and enforcing such a contract as equally just, moral and conscientious." (Bearse v. 340 Pigs of Copper, 1 Story, 323.)

In the H. D. Bacon, 1 Newberry's Adm., 279, it was well said that if the compensation agreed upon must be proved to be just and reasonable, the same proof would insure a recovery for the same amount without any contract, and it need not be proven that no advantage was taken of the situation.

"The true principle by which such cases should be governed would appear to this court, with great respect for others, to be that established in like cases in courts of equity, that is, that a contract should be presumed *prima facie* to be fair, but if proven to be unconscionable, a court of admiralty, like a court of equity, would refuse to enforce it."

In the H. D. Bacon, libellants agreed, with a diving bell, to

raise a sunken steamboat of the value of about $20,000. The master promised to pay $4000, but the owners resisted the claim upon the grounds that the boat could have been raised without the aid of the bell, but not in so short a time (twelve hours), and that the charge was unreasonable and unjust.

The court upheld and enforced the contract.

The Silver Spray (E. D. Mich.), 1 Brown's Adm., 349, applied the rule to the salvor, who, deeming the agreed compensation inadequate, sued for more and set up his mistake of fact and inadequacy of the amount for the labor, skill and money expended by him. The court found that it was no doubt a hard bargain for libellant, but that it would not be set aside for that cause alone. *That he had ample time for consideration, and there was no pretense of any fraud or deception used towards him, or that he did not know the situation and the difficulties in the way.* On page 354 the court says: "The contract appears to have been entered into openly and fairly in all respects, and there is no principle and authority upon which the court can disregard it, or make a new contract for the parties. It must be enforced as it stands."

The True Blue, 2 W. Rob., 176, was a case very much like the present, except that in that case the expense was largely increased by a storm having come on, and yet the contract was enforced, although the disparity was great. * * * "*Parties must understand that contracts fairly entered into will be strictly enforced in admiralty as well as elsewhere.*"

A very just and reasonable view of a kindred question is thus expressed by Ware J. in the Centurion, Ware, 481:

"It does not appear that this business of saving the wreck was attended with any peculiar danger, but this was solely owing to the favorable state of the weather. Had the weather changed and become tempestuous, the peril might have been very great, not only

to the salvor's vessel, but to all who were engaged in the enterprise. This was a risk which the salvors took upon themselves."

The vessel saved was stranded upon a sandbank twenty miles from Cardenas, Cuba. The salvor, with the aid of her crew, took out part of her cargo and then towed her off to Mantanzas. They were awarded by arbiters one-third of the net proceeds of the cargo, and one-half of those of the vessel, and the finding was not disturbed.

2 Parsons Ship. & Adm., 306, note 2, after citing several American and English cases, declares: "What we consider to be the true rule is stated in the case of Eads v. The Steamboat H. D. Bacon, 1 Newb. Adm., 274, 280, 'that a contract should be presumed *prima facie* to be fair; but if proven to be unconscionable the court of admiralty, like the court of equity, would refuse to enforce it." In the Helen & George, Swaby Adm., 368, Dr. Lushington said: "This case turns upon the effect of the agreement, which was certainly made by the master. It was truly contended by Dr. Jenner that such agreements will generally be enforced by the court. The principle upon which the court acts is, that if satisfied that an agreement has been made, it will carry it into effect, *unless totally contrary to justice and the equity of the case;* but the owner of the ship, against whom the agreement is attempted to be enforced, may show that it was improperly obtained. The owner may contend that, under the circumstances, the sum of money was grossly exorbitant; and *a fortiori* if he can show that the agreement was obtained by fraud or compulsion, no court would hold it to be binding. But when the execution of such an instrument is once proved, it is *prima facie* binding, and the burden of proof falls on those who dispute the validity of the instrument."

The Wellington (48 Fed., 475) was towed about 544 miles in four days, for which she agreed to pay $15,000, and the agreement was enforced. The court says: "I can not see any just

grounds for holding that the master of the Wellington, in making the contract in question, acted under compulsion or duress, or that any advantage was taken of his unfortunate position by the master of the Montserrat. Nothing could have been fairer than the offer of the Montserrat to perform the services and let the compensation therefor be fixed on arrival in San Francisco by the owners of the Wellington; yet that offer was refused by the master of the Wellington, who, for some reason not apparent, wanted the amount to be fixed in advance. There was no compulsion about the case for the reason that the salvor, as just stated, offered to render the service without any contract at all, which offer was refused by the master of the Wellington. This fact is of itself sufficient to dispose of that objection to the contract made. * * * *The amount was undoubtedly too large for the services, but I do not think it so exorbitant as to justify the court in setting aside the contract thus made.*"

"If the amount agreed upon exceeds somewhat the accustomed measure of a liberal reward, it will not be disturbed if deliberately and understandingly assented to, without the judgment of the promising party being overborne by the distress in which he is placed."

There are no two cases precisely alike, and no absolute standard can be found. The analogies of precedents illustrate the general principle, a fair and reasonable application of which to the facts of the case in hand will aid us in reaching a substantially correct judgment.

Two recent cases which we consider as strongly supporting our general contention that the compensation was not grossly excessive or unreasonable are:

The Lamington (C. C. A. 2d Cir.), 86 Fed., 675.

The Haxby (C. C. A., 4th Cir.), 83 Fed., 715.

II.

WAS THE AMOUNT AGREED TO BE PAID SO EXCESSIVE AS TO BE UNREASONABLE AND INEQUITABLE?

That it is more than a court of admiralty might have allowed in the absence of a contract may be conceded. When the ship first stranded, Clarke offered to undertake the task for such award as the court might decree, but this Burgess refused, for the reason, among others, that the service might be unduly prolonged and he, therefore, called for proposals and received at least two.

But, would a court of admiralty have materially lessened the recompense and the bounty, both of which are essential elements of salvage, in view of the restriction placed upon the salvor requiring him to fully succeed within twenty-one days or lose all the time, expense and labor he had ventured?

A court would make an award still more liberal when it is shown that the salvor assumes a serious risk, as Clarke & Co., did, in undertaking to save the vessel within a short specified period. Again, with reference to the probable as well as the actual conditions, instead of being delayed one day in working at sea with his plant and anchors, because of rough weather, Clarke might have been delayed many days, but for the unusually favorable winds and tides and weather, in heaving the ship out of her bed and dragging her a thousand or twelve hundred feet. His work, as that of other salvage on this coast, was subject to interruption from winds, seas, break downs and all the vicissitudes of the equinoctial season upon a lee shore, so that it is difficult to perceive that a court of admiralty, having regard to both present and potential conditions, would have decreed so low an amount as did the Court of Circuit Appeals, even had there been no contract deliberately entered into and with full knowledge on the part of owners, as

well as of the master, of all the circumstances and probabilities. It has been the history of all ships that have gone ashore on the gulf coast and very probably elsewhere, that the longer they remain out of their element the more difficult, expensive and uncertain it is to rescue them, and so, when several days had passed, libellants had the right to ask such terms as the probably increasing risk and cost fairly seemed to justify. The utmost good faith characterized all their conduct. The charges of fraud and bad faith were wholly unsustained. The overwhelming weight of the evidence is that the ship was being embanked, the banks varying with winds and currents. The very place has, since that time, owing to the action of the currents upon the jetties, shoaled to two feet. (Johnson, 119.)

As Judge Boarman said in the Guadalupe, 20 Fed., 445: "In reply to the suggestion made by respondents that the Guadalupe was not in peril when the tugs came to her, it may be remarked that the true element of the ship is in the sea, and her life is only full and complete when she is riding in deep soundings, at anchor, or when she can respond and move at her master's will on the ocean in pursuit of her useful purposes. And when such a ship, at a time marginal to the equinoctial period (Sept. 24), is found in the shoal water of the Mexican gulf, with the full length of her flattened bottom pressed by her great weight into the sand, unable, by the application of all her great power, supplemented by favorable tides and winds for seventeen hours to move herself, it can not be said that she is free from serious distress, though the sea and the conditions about her may give no perceptible evidence of immediate peril. The proof shows that she did not and could not, with favoring tides and winds, move herself for seventeen hours; and under such circumstances the conclusion can not be avoided that she was in distress, and that the peril attending such a ship was much more than a possible danger.'

The opinion in that case comments upon the speculations of the captain in his depositions, which are at variance with the record of the log, just as in our case, and the clear and admirable reasoning in that opinion can not be answered.

There may be a few cases found in which courts have reduced the amount of the contract price, but the circumstances were extraordinary and generally tainted with fraud.

Burgess had the benefit of the disinterested advice of the insurance agent, masters of vessels, pilots and residents, and they all concurred with the views which the master then held and expressed, and which were based upon his own experience of thirteen and one-half years and his knowledge of this and similar coasts where the sand formed banks around vessels.

How does the consideration compare with the value of the property saved?

The master (216) puts the Elfrida's value at £22,000. She was insured for £18,000. The estimate of one of her owners that she was not worth as much as her insurance discredits itself. (See first part of brief, where value is fully discussed.)

III.

WAS ANY UNDUE ADVANTAGE TAKEN OF THE MASTER?

If so, the record does not disclose it. No one sought to persuade him: from the 10th, when Clarke left, until the 15th, when he returned, no one in Clarke's interest talked with him. He told Morrissey that he was communicating with the Merritts, a large wrecking concern. The latter told him to do nothing without consulting his owners, and all the witnesses who spoke to him practically confirmed Mr. Sorley's advice; but it will be sufficient to rest this part of the case upon the master's own testimony. He

says he did consult with the pilots, Lloyds' and others, and that his judgment accorded with theirs as to the acceptance of Clarke's tender, and that no one misrepresented any fact to him. (215-210.) Clarke's opinion that sand banks might form, *expressed after the contract was agreed on and not an inducement thereto*, was the same as the captain's and that of every other witness who testified upon the subject. In fact, it had formed to the depth of two feet. (89.) Burgess (243.) At the stern the most (243.) The charge of undue advantage is a reflection upon several good people, in no way interested in this contract, upon the dead, as well as the living, and without color or foundation, and due solely to an attempt to escape, by any means, from what now is claimed to be a bad bargain after its benefits have been received.

Let us ask if claimants, after receiving the master's letter of October 7, which in due course of mail would have reached them on October 16, one day before the vessel was salved, thought the compensation excessive, why did they not at once take other steps, through Lloyds' agent, the master, or independently of either. They could have arranged for salvage from New Orleans or Key West, if not from Galveston, not to speak of the resources of the wrecking organizations on the Atlantic coast. They can not stand by, under all the principles of equitable estoppel, and permit the work to be done under the contract with full knowledge of all the circumstances, and without dissent, and then successfully ignore it. The old principle of right and equity here applies that having remained silent when they should have spoken, they must not now be heard to speak, when they ought to remain silent.

IV.

WAS THE VESSEL IN DANGER OF LOSS OR SERIOUS INJURY?

In addition to the testimony of the pilot, Coveney, of the master

and others already given, we will briefly summarize the record as to the actual and probable peril of the vessel. Coveney shows that if an equinoctial gale, which was to be expected in September and October, had come up, she would have become a total loss. That in going on the beach she lost two kedge anchors and a bow anchor. (89-90.)

F. Johnson, a pilot on the Brazos bar, says that she was in five feet of water, and in danger of going up higher and broaching, in which case her rudder might have been broken and she otherwise disabled, and the expense of getting her off doubled. That the sand banked under different parts of the vessel according to the currents, and that this would strain her and be apt to start her plates, when she would bilge and the sand get into her. That would be the effect of the southeast winds. The storm winds come from east to northeast and go around to the south, and could reasonably be anticipated in October. (115-116.)

The Elfrida, as shown by the rough sketch made by her captain (322), was entirely exposed to the winds from the southeast and around to the west. The jetty to the eastward was for 2000 feet under water and at the shore end only about two feet above water. In fact, a northeast wind drove her ashore. (219.) The record of previous years showed that the October winds sometimes reached a velocity of sixty miles per hour. (146.) The sands shifted with the tides. (52.) On the day she was beached the Weather Bureau advised a tropical hurricane for Port Eads, but Velasco proved not to be in its course. When first ashore the prospect of getting her off was favorable, but after the high wind of the 10th she was firmly imbedded. In fact, must have gotten higher up. (65.)

A. D. Smith, a pilot on Galveston bar, and for twenty years familiar with the coast and the results of vessels stranding, testified that he considered the Elfrida's situation very serious. It could

not become better and it might become worse and become a total wreck. Stormy weather would at least damage her and stop work, and might prevent her being taken off at all, which had occurred in other instances. The bark William was gotten off and drifted back and became a total loss. She was of 1200 tons. The chances are the Elfrida would have washed upon the beach and not be worth taking off, if she did not work down into the quicksand.

The Francisca, a large iron steamer, worked into the quicksand on Galveston bar. She was ashore twelve days, and had a good deal of water and sand, and was seriously damaged. In a storm the chances were that the Elfrida would go higher on the beach. The gales of wind we have go around from the east southward and end in the northwest. The jetty would be no protection from the southeast wind. (92 to 106.)

Wm. Scrimgeour, with an experience of twenty-four years on this coast as mariner and pilot, stated that a big tide and gale would bring the Elfrida higher on the beach, and in doing that she would likely get to leaking and sink in the sand. (92.) October is the windy month. (92.) With the current running at all the sand banks up on the side the eddy is on. (92.) The Alabama, an iron steamer of 400 tons, went ashore and was badly damaged. Her back broken nearly in two. (93.) The Australia, an iron steamer of 2000 tons, was taken off by the Merritt Wrecking Company after much delay. (93.)

William A. Hutchings, Superintendent of the Life Saving Service, mentioned a great many vessels that were stranded on the gulf coast, some of which were wholly lost and others much injured. (96.) Among them was the iron propellor Aransas of 900 tons. In a heavy southeast wind the Elfrida was in a precarious condition, liable to be bilged by heaving up and down and filling with sand. When that occurred she would settle rapidly. "Placing myself as captain of the vessel, I would be in grave ap-

prehension as soon as she struck, and would use every means to get her off as soon as possible. I believe that every minute a vessel lies on this beach enhances the danger. There is no time to delay. Even an ordinary fresh breeze causes a good surf on this beach." One at twenty miles an hour causes a wave action that would break up a vessel, or drive it higher on shore. (97.) If she should rise and fall and strike the ground "the concussion would have a tendency to start her rivets and start her to leaking." (98.) The sand was likely to form. It is very movable in these waters. (98.)

Hauling off with anchors is the safest and surest way. (102.) The surf, in nine feet of water, or seven in a gale, breaks very viciously. A vessel goes gradually shoreward and makes a bed for herself. (103.) The jetty did not protect against southeast wind. (103.)

To the same effect was the testimony of James McDonald, who had been a pilot for twenty-one years, and who knew every part of the Texas coast. (106.)

We are likely to have hurricanes in October. (107.) He told of a number of vessels that had been wrecked, and some of them lost on this coast. The bark Houston was lost. The Reindeer, an iron steamer, also. (110.) The sands were shifting. (112.)

Robert Ross, also familiar with the coast, explained the position of the Elfrida, and that she was likely to start to leak by pounding and starting her rivets, when she would sand up and probably be a total loss. (122.)

An iron steamer, the Alabama, within his knowledge, had gone ashore, and when taken off after the lapse of over two months her back was broken. (124.)

J. Anderson: The jetties were not any protection at all. When the sea breaks in at all it comes stright in there. (125.)

The Merritt Company took off the iron steamer Australia, for

which they received $60,000. It took them three weeks to get here and *nine weeks* to do to the work. (Moller, 139.)

The log of the steamer of the 18th described the vessel's winches, windlass, cables and ropes as badly strained and damaged. Two anchors, wire, rope and cable lost. (220.) Steamer's steering gear badly strained, working badly, and pieces broken off of four blades of the propeller. Cement broken at various parts of bottoms of tanks. Bottom slightly indented. (221.)

The engineer's log showed that rudder and other valves were damaged and broken. Bilge pipe broken. (221.) Engines, steam windlass and winches strained heavily. Circulating valves split and ballast donkey strained in pumping through condenser. (223.)

Although the tide record at Galveston did not show quite as high a tide on October 17 as on other days while the ship was ashore, yet the tides were not necessarily the same at the mouth of the Brazos. Owing to the winds and distance they might be different at the two places. (Judson, 20.) A very high flood the day she was launched was shown by Coveney. (186, 89.)

V.

THE INQUIRY IS NOT WHAT THE COURT SHOULD HAVE AWARDED IN THE ABSENCE OF A SPECIFIC AGREEMENT, BUT WHETHER ANY SUFFICIENT REASONS HAVE BEEN ADVANCED TO JUSTIFY THE VIOLATION OF THAT AGREEMENT, AND TO HOLD IT TO HAVE BEEN UNREASONABLE AND UNCONSCIONABLE, UNDER ALL THE CIRCUMSTANCES.

Claimants, with much diligence and learning, argue below that if there had been no contract the award should have been less, and

they presented under subdivisions various ingredients of salvage service, apparently contending that to justify an allowance of twenty per cent or twenty-five per cent of the value saved all of these should concur. If they did, we would, under the decisions, be fairly entitled to about a moiety of the Elfrida, but as the argument of counsel was largely abstract, we will not discuss all his subdivisions.

To adopt the language of the Supreme Court in N. Y. H. Protection Co. v. The Clara, 90 U. S., 1, the elements necessary to constitute a valid salvage claim are:

"(1.) A marine peril to the property to be rescued. (2.) Voluntary service not owed to the property as a matter of duty. (3.) Success in saving the property, or some portion of it, from the impending peril."

It is not asserted that the lives of those on the Elfrida were in present jeopardy. If a severe storm had arisen they would have been, especially if they tried to reach the shore through the heavy surf.

We think it has been shown that the Elfrida's hazard was imminent, as well as prospective. Claimants' logic would deny the validity of such contracts unless the vessel were practically lost, and then there would be no property to be charged.

The value of the property saved, according to the captain, was about $110,000, and was insured for $90,000. While salvors encountered no extraordinary perils to persons or property, yet the tug made an unsuccessful effort to get alongside, but the wind was too strong (114), and, afterwards, when she did go to the stern of the Elfrida, towing the lighter and connecting the cables with the anchors, she thumped hard and was in danger of breaking to pieces. (117.) When first stranded Clarke came aboard when it was very rough. The witness was surprised that he should have come at all in such bad weather. (Johnson 116.)

Clarke became responsible for at least one of the lighters, and his own plant was at sea. As to the skill and conduct of the salvors, no criticism is suggested. In fact, there was no more competent or skillful salvor upon the coast than Clarke. Results demonstrate this.

The property used by him was of the value of about $40,000 (116.) Two tugs, two schooners, two barges, anchors, hawsers, etc., formed the outfit. It is true that only a few days in time was expended and the labor of about forty men. The actual removal of the vessel from the beach occupied only about four hours, but it will be remembered that this was not a service to be compensated according to the time and the force employed, but according to the results achieved. Salvors hauled upon the vessel a half or three-fourths of an hour, so her chief mate states, before she commenced to move, when "she came along with sudden jerks. There was a jerk and a stop and then another jerk." (226.)

The pilot says the start was mighty slow. "The sea was coming in and she was well in her bed and would come out by jerks of about an inch at a time." (85.) It is true that no explicit evidence of expense incurred in the performance of the salvage service was offered, but from the number of men and vessels and length of time employed, a fair idea of the reasonable expense may be derived. This, of course, would not include the neglect of other business.

We, in the beginning, reviewed the facts which led up to the contract and accompanied and followed its performance. They attest the good faith, fairness and value of the agreement, and the services which it called forth and induced, and the fact that "the end crowned the work."

VI.

THERE WAS A SUBSTANTIAL COMPLIANCE WITH THE CONTRACT, IN ALL ITS TERMS, AND ITS OBJECT WAS PROMPTLY AND SKILLFULLY ACCOMPLISHED BY LIBELLANTS.

Claimants insisted below that libellants' use of the winches, two anchors and cables of the vessel was such a departure from the contract as to annul it, and require a decree by the court of a greatly reduced award. This is not in accord with the language or true intent of the writing, and is untenable. It was stipulated that salvors should have the use of the crew and engine of the ship. Construing this with reference to the undertaking in hand, it is evident that the use of the crew necessarily implies the use of the appliances with which they work; otherwise there could be no use of the crew. A workman is useless without his tools. The engine is the complement of the crew, both meaning men and machinery, or such power and means as the vessel had to assist in her rescue. If the very strict notions of claimants prevail, the contract, in this respect, is meaningless. It must be read altogether, and steady regard be had for its purpose. The crew could not be used without the implements provided for them, nor would an engine be of avail without its boiler and connections. The reasonable rule, and therefore the right one, is that when authority is conferred for a particular purpose all incidental means necessary or proper to effectuate it are included in the grant, without express mention. But a steam winch or capstan is an engine. The evidence so describes it. In like cases, courts hold the singular number as collective.

Like observations, in the main, apply to the use of two of the ship's anchors and cables. The agreement provided for lightering the vessel, and the removal of the heavy anchors, weighing

down her bow, already fastened in the sand, certainly tended to aid in floating her. The fact that they were hauled on was obviously regarded by the parties as within the fair purview of the contract, but if not, it is now too late to object. The master, who spoke for and as the ship was silent then, when he should have objected, if he had the right to do so, and to allow such an evasion now would put it in the power of his principals to perpetrate a fraud. They are bound by his acquiescence. In fact, the practical contemporaneous construction of those who made the contract should, in the light of all the facts, control now as then.

VII.

THE AMOUNT DECREED IN THE TRIAL COURT WILL NOT BE REDUCED, EVEN WHEN THERE IS NO CONTRACT, UNLESS FOR CLEAR AND PALPABLE MISTAKE, OR GROSS OVER-ALLOWANCE, NONE OF WHICH EXISTED IN THIS CASE.

The Connemara, 108 U. S., 352, is one of the many authorities in support of the above doctrine. The Supreme Court took the view that as the lower court had most of the witnesses before it, it certainly was in a better position to judge of their credibility and weight than the appellate court could be, and if there was any fair evidence to sustain the decree it should stand.

Judge Bryant heard all the witnesses, except the owner, master and crew of the Elfrida, and of these the master was the most material, and his evidence in, perhaps, the most essential particulars corroborates that offered by libellants. The consentient mass of the testimony is most cogent in support of the fairness and reasonableness of the contract, and the exposure and peril of the vessel, and the fact that the contract was practically a land contract, made after much deliberation and without compul-

sion or deception of any kind. There is certainly abundant evidence to sustain the decree, which found specially that the *services were salvage services and should be compensated as such.* That the master was authorized to make the contract. That it was lawful, and entered into with full knowledge, or means of knowledge, of the master and of the owners of all the conditions then existing, and that the *amount named was not unreasonable under the said conditions.*

As Chief Justice Marshall in the Sybil, 4 Wheat., 98, said: "It is almost impossible that different minds contemplating the same subject should not form different conclusions as to the amount of salvage to be decreed."

Appellate courts are reluctant to disturb an award for salvage on the ground that the subordinate court gave too much, unless they are clearly satisfied that it made an exorbitant estimate of their services.

The Comanche, 8 Wall., 448.

The Circuit Court of Appeals for the Fifth Circuit, in the recent case of Compagnie Commerciale v. Steamship Company, 60 Fed., 921, allowed for towage of a steamer that had broken her propeller shaft while on her way from Tampico to New Orleans, $18,716. The towing vessel was delayed two days. The vessel towed had sails, rudder and steering gear in perfect condition.

This court should not alter the decree for the reason that the amount awarded may appear to it to be too large, unless the excess is so great that upon any reasonable view of the facts found the award can not be justified by the rules of law applicable to the case.

P. S. Co. v. Salvage Co., 123 U. S., 40.

The Hope, 10 Pet., 108, is a leading case upon this subject.

"The rule is well settled that in cases on appeal in admiralty, when the questions of fact are dependent upon conflicting evi-

dence, the decision of the district judge, who had the opportunity of seeing the witnesses and judging their appearance, manner and credibility, will not be reversed unless it clearly appears that the decision is against the evidence." This is the exact language used in The Alijandro (C. C. A., 9 Cir.), 56 Fed., 624.

In the Albany (C. C. Dist., Mass.), 48 Fed., 565, it is said that the decision of the district judge, where questions of fact depend upon conflicting testimony, who has had the opportunity of seeing the witnesses and judging from their appearance, should not be reversed, unless it clearly appears that the decision was against the weight of the evidence.

In the case at bar all of the witnesses took the stand in person, except the master of the Elfrida and several members of the ship's company, and Thomas Bell, one of the claimants, and their evidence does not materially modify that given before Judge Bryant by the other witnesses. The master was examined by counsel before a commissioner on three different occasions. His evidence and that of his crew confirm in all important particulars the testimony offered by us. Claimants also offered and thus vouched for the pilot who was in charge of the Elfrida when she stranded and for three days afterwards, and his evidence, as well as that of the other witnesses, is convincing and undisputed as to the perilous position of the Elfrida, the harm, impending and prospective, and the necessity and value of prompt measures for her rescue.

There are two instructive cases decided by the Circuit Courts of Appeal of the Second and Fourth Circuits, respectively, viz.: The Lamington, 86 Fed., 675, and the Haxby, 83 Fed., 715, which awarded salvage of one-half and one-sixth in the absence of a contract.

The Haxby very strongly resembles the case at bar in the nature and duration of the services, the value of the property and other features.

Appended to the Lamington are extensive notes prepared by Judge Lacombe which epitomizes several cases where the validity of salvage agreements was in question, nearly all of which we have cited.

See also the North Erin (E. D. N. Y.), 71 Fed., 430, where the court allowed a tug $10,000 for going eighty miles and pulling off shore a steamer worth, with cargo, $100,000, the weather being favorable. This was without a contract.

In the Kenilworth (N. D. Cal.), 41 Fed., 523, the allowance, without a contract, for salving $100,000, was 14½ per cent.

VIII.

THE BURDEN OF PROOF, UNDER THE DECISION IN THE AGNES I. GRACE, *SUP.*, AND OTHER CASES, WHICH WE HAVE CITED, WAS UPON APPELLANTS.

IX.

THE CHARGES OF COLLUSION BETWEEN COMPETING SALVORS IS REFUTED BY THE EVIDENCE, AND CAN NOT AFFECT THE NATURE AND VALUE OF THE SERVICES, OR THE MERITS OF THE CONTRACT.

We have collated the evidence showing that it was extremely improbable that the master solicited a second bid from Brock. He, for the first time, claims that he did in his *third* deposition. The internal evidence of his error consists in the fact that in the absence of Clarke Burgess telegraphed to Moller to send someone else at the same price. If Brock had joined with Clarke he would not have run the risk of the contract going to a third person, and, when Clarke was delayed, would have himself offered to have

done it at the same price, or perhaps less, and while he was getting ready to do the work Clarke would have had time to come. It is not shown that Brock knew that the master's authority to accept Clarke's bid was qualified. Bearing in mind that Brock is dead, and the indefiniteness of the master's testimony, in this respect, its rejection in this particular was justified. Obviously, the trial court did not give it credence.

The fact that Brock undertook to notify Clarke of the movements of the vessel, so that she could be seized if the contract was not complied with, is proof only of a just and friendly spirit. Brock did no more than any one else would have done under the same conditions. He had been working for Clarke, and it was no evidence of a conspiracy that he should acquaint Clarke with the situation so that the ship would not run away before the debt was paid or secured. It is true, also, that Clarke owed Brock for his services and the hire of his barge.

The party alleging collusion should prove it.

J. Moller, the charterer, was betraying no duty in asking Clarke not to precipitate litigation, and in assuring him that he would let him know before the vessel sailed. This was the right thing for him to have done, and when Clarke wired requesting him to ask counsel to proceed against the Elfrida, he bore no such relation to the vessel as forbade his compliance with the request. Neither the interest of the ship, nor his duty as a charterer, were affected or violated by what he did; but, be that as it may, the question still recurs to the contract, and, if it was fairly entered into, and was not grossly unjust and oppressive, then it should stand, whether there was any competition among salvors or not. The proof, however, conclusively shows such competition.

Before leaving this subject we again refer to claimants' pretense that Lloyds' agent, Mr. Sorley, was not physically or mentally

capable of performing his duties. Yet he was on the stranded vessel two days.

James McDonald and others testify that he had been Lloyds' agent for a great many years, and in marine matters was regarded as the highest authority in Galveston. While he was old and feeble, his mind was clear and active. He was a man of superior intelligence and acquirements. McDonald says, and the other witnesses who knew him all corroborate him, "If he (Sorley) was not an honest man there was not one in Texas." His judgment was not impaired by his age and experience. (109-110.) He was a great expert in maritime adjustments, insurance and like questions. (Moller, 134.)

Mr. Sorley and Captain Brock were not living when the cause was tried.

The statement by Clarke of his opinion that there was danger of a sand bank forming about the ship was made after the master was directed by the owners to accept his bid, and seemed to have been Clarke's argument against a reduction of the bid. It could not have influenced Burgess three days before and it is elementary that expressions of opinion, forecast or expectation, that are, in substance, merely matters of inference can not be made the subject of false representation.

Gordon v. Butler, 105 U. S., 553.

Green v. Societe, etc. (C. C. R. I.), 81 Fed., 71.

X.

BRIEF GENERAL REVIEW.

As it has required considerable space to present the facts and the law with care and detail, we have thought it well to offer in conclusion a summing up of the principal points in the case, of fact as well as of law.

1. Libellants proceeded against the steamship Elfrida to enforce a contract made October 15, 1894, between the steamer, acting through her master, and ~~applicants~~ libellants, by the terms of which they undertook to float and place in a safe anchorage the Elfrida, then stranded west of the jetty at the mouth of the Brazos river, on the coast of Texas; to furnish all labor and material therefor at their cost, including a diver and necessary apparatus to survey said vessel, and to complete the work within twenty-one days, for which, if successful, they were to receive $22,000.00. The master, however, reserved the right to abandon the ship in favor of libellants in lieu of the $22,000.00, if he so desired. Should the libellants fail to float and place her in a position of safety within the twenty-one days, they were not to be paid anything. The use of the crew and engines of the steamer were placed at the disposal of ~~applicants~~ libellants. The Elfrida had been driven up on the beach a distance of one thousand feet from water of sufficient depth to float her. She drew eleven feet, ten inches, and was imbedded in the sand about six feet at the bow and four feet at the stern. Her draught, after pumping out water ballast, was nine feet. A strong wind and sea had forced her over the jetty on October 6, 1894. On the next day a cable, a chain and wire rope attached to the anchors, which had been let go, broke, and, with the anchors, were lost, and so she was driven further up on the beach. The two following days the sea was smooth and the wind light. On October 10th a strong southerly gale and a high sea caused her to bump and strain heavily. The weather continued bad until the 13th, when it moderated; on the 14th and 15th a strong southeast gale and very high sea prevailed, but the ship was fast imbedded in the sand and did not strike. On the 16th the weather was again fair, and on the 17th it was very fine, with a very high tide. On this day the vessel was taken off by libellants, who had been several days in securing and equipping the necessary vessels and plant for that

purpose. The master had previously ineffectually attempted to move her with the aid of her own anchors, cable, gear and a tug-boat, but had failed, losing his anchors and straining the ship's appliances. She was helpless for eight days before the contract was made. From the time she went ashore, the master was in communication with the agent of the ship at Galveston, who also had a representative upon the ground, and with Lloyds' agent, in the interest of the underwriters, who was on the vessel two days after it stranded, and by cable with her owners. Before he made the contract, the master acquainted himself with the conditions, he knew that the ship would be seriously damaged or lost in the ordinary course, unless promptly rescued, and endeavored to make arrangements for her salvage with the lighter company at Galveston, but failed to agree with them. He also sought information and advice from the pilots at Velasco and the masters of other vessels in that port, and after the fullest inquiry, and after refusing an offer made by libellants to undertake the floating of the ship for such compensation as the United States Court might award, he concluded to solicit bids. The ship's and Lloyds' agents concurred in this course.

In response, he received two proposals, one offering to do the work for $24,000, the other for $22,000. He cabled the lowest to his owners and was instructed to accept it, if lower impossible. "*No cure, no pay.*" This instruction was given after Lloyds' agent had been communicated with by Lloyds' while he was at Velasco, and had advised acceptance of libellants' tender.

Under this authority he entered into the contract with libellants. At that time, according to the evidence and without conflict, all parties thought the matter of floating the ship would be a difficult and tedious task, necessarily taking time, and uncertain as to the result. That the master and owners so believed is shown by the fact that they required the contractors to do the work in twenty-

one days, and stipulated for the option to abandon the ship in lieu of paying the compensation agreed upon, and that the contractors so believed is shown by their extensive preparations. They hired a large force of men, between thirty and forty, procured nearly a month's supplies, cables, chains, anchors, two tug boats, two lighters and two schooners, fully manned and equipped. Some of this plant belonged to them, but the schooners and lighters and their equipments were hired. For one of the lighters they agreed to pay $6500 if she should be lost. All this property, worth about $50,000, was exposed to risk of loss or damage in the breakers, or by contact with the jetties upon which the Elfrida struck. One of the tugs struck and pounded heavily in going to the Elfrida with cables. They were engaged about five days in preparations and work, and by means of their appliances, skill and experience, with very favorable weather and high tides, the Elfrida was floated. The means used was by planting heavy anchors in deep water, with the aid of a tug and barges, from which cables and lines were carried to the vessel and heaved on with her winches and the steamer thus gradually worked from the bed in which she laid, and pulled about one thousand feet until she was afloat. She was worth, according to the evidence, from $90,000 to $110,000. She was insured for the former sum. The only defense made, so far as the evidence discloses, is that the compensation contracted for was excessive, because of the signal success of the salvors within the short time employed. There was absolutely no proof of any fraud or bad faith on the part of salvors in making the contract.

The amount agreed upon was 25 per cent, or less, according to whether the insured or master's value is taken, of the value of the property saved, and was a moderate, if not low compensation, from the outlook before and at the time the contract was made, and, in view of all the facts, was not excessive or unreasonable, and should be paid.

2. The right to agree upon compensation for salvage service, if not practically denied by the opinion of the majority of the Circuit Court of Appeals, is so restricted by it as to discredit and discourage such agreements and thus impair their efficacy. It not only invites litigation, but puts it in the power of either party to such contract, however fairly entered into, to be relieved of its obligation, if, in view of the time spent and efforts employed in accomplishing the result, the recompense, after the vessel has been rescued, is deemed either too onerous or too inadequate, whatever may have been the conditions and the probabilities before and at the time of making and carrying out the agreement.

A careful scrutiny of the evidence reveals the main, if not the only, contention upon the part of the vessel to be that, considering the time, expense and labor necessary to save the steamer, too large a proportion of her value had been agreed to be paid. This is not the test, but the real and only question is, or should be, was the bargain fairly made, or did the salvor impose upon, or take advantage of the situation of the master and the vessel to extort an unreasonable compensation?

The Circuit Court of Appeals should not have considered this case as if it were a question of salvage alone, but should have determined whether or not the contract was freely and voluntarily made after ample opportunity for inquiry and deliberation, and whether or not the amount agreed to be paid was grossly disproportionate to the value of the property saved, keeping in view the facts present and probable, as well as the contingency that the contractors could have lost three weeks' time, with the expense and labor incident thereto, and have reaped no reward, if unsuccessful in taking the vessel off, although they might have moved her to within a few feet of deep water.

The master says: "I wired them (the owners) that there was every probability of a bank forming around the ship, which was

my opinion," (and was also that of every person who testified in the case, and the disinterested persons whom the master consulted.) He further swore that the salvors had two tugs and two lighters; that where she was grounded was six feet deep at the stem and eight feet at the stern, and by pumping out the water ballast her lowest draught would still have been nine feet. In other words, with the ballast out she would have still been three feet in the sand at the bow and one at the stern.

3. The facts fully sustain the fairness and validity of the contract, and the absence of any improper pressure or undue influence from any source. The services consisted of the successful removal of the steamer from the beach where she had been stranded for ten days. The contract was made in writing a week after she went ashore. She had at first struck and pounded upon the bottom, but, her cable parting, had been driven further up and had settled or become embanked in the sand, and so remained until taken off by ~~appellants~~ Williams. She drew over nine feet. The depth where she lay was several feet less, varying with the tides.

As to the perilous condition of the vessel, her log is probably the most reliable and the best testimony, but the Court of Appeals seems not to have considered it. (246-7.) This shows the variations in wind and weather. A strong wind and sea having driven the ship over the jetties on October 6, on the 7th her cable chain and wire rope parted and with their anchors were lost and she was driven further on the beach. On the 8th and 9th the wind was light and the sea smooth. On the 10th a strong southerly gale and high sea caused the ship to bump and strain heavily. This weather continued until the 13th, when it moderated, but on the 14th and 15th we find this entry: "Very strong S. E. gale and very high sea. Ship fast on the ground." On the 16th the weather moderated

and on the 17th was very fine, and on the latter day the vessel was pulled off after several days' preparation. We ask the court to review this log.

It will be borne in mind that the reckless charges of fraud and undue influence that were made by ~~appellants~~ claimants were utterly overthrown by the proof.

Insufficient importance seems to have been attached to the master's testimony, where it is shown that the pilots, underwriters' agent and others, all concurred in regarding the vessel's situation as perilous. The court say that the evidence showed that no iron steamer had been lost on that coast. McDonald testified to at least one total loss, and others to vessels having been broken up.

Where the vessel stranded there was at the time of trial only two feet of water, the sand having banked up. The weather record shows that the wind attained a velocity of as high as thirty-three miles per hour during the time that the vessel was ashore.

There had been full inquiry and careful deliberation on the part of her master as to the best course to be pursued for several days after the stranding. He thoroughly understood the situation, her exposure to the storms of the gulf, and the great probability, next to certainty, that she would, in the heavy weather which was to be expected at any time in October, be either wholly wrecked, or greatly lessened in value by breaking up, or becoming still more deeply imbedded in the sand, one of which results would have inevitably ensued, according to the history of similar wrecks upon the shores of the gulf. He communicated with his owners by cable during this period and had their approval of the contract. He also sought the advice of the charterers, of the pilots of the port, and of masters of other vessels, whose views agreed with his, and the contract was also with the full approval of Lloyds' agent, who represented the insurance companies. After the fullest investigation, he acted upon his own judgment in engaging libellants to

take off his vessel, which conclusion was sustained by all the facts, as well as by the disinterested information and advice of those with whom he had conferred.

4. Upon these undisputed facts a question of far-reaching importance and gravity arises, affecting the right of freedom of contract, and, as a consequence, valuable maritime interests. Are contracts made upon land, for the relief of stranded vessels, with full knowledge of existing conditions and after many days' delay, subject to the same rules as salvage contracts made at sea by ships in distress without time for deliberation or opportunity to seek other assistance? If the same rules are applicable to both, then were the circumstances attending the making of this contract, as well as those preceding and following it, such as to destroy its validity, and to authorize the substitution of the idea of a majority of the Court of Appeals as to what is a proper compensation for the solemn agreement of the parties themselves, fairly entered into, without compulsion, overreaching or bad faith of any kind? Upon the other hand, should not parties in such cases as this "understand that contracts fairly entered into will be strictly enforced in admiralty as well as elsewhere?"

5. A brief outline of the facts proven has been given in order that this court may perceive the necessity of correcting the judgment of the Circuit Court of Appeals, which reversed that of the trial court. The latter had the witnesses before it, heard them testify, and, after a full and painstaking consideration of the evidence, argument and authorities, on October 29, 1895, entered its decree, finding, among other things, that the services were rendered in saving the steamship under a contract in writing made

between libellants and her master, who was duly authorized to make the same. That it was a lawful contract and was entered into by the master of the steamship with the full knowledge, or means of knowledge, of the said master and of the owners of said steamship of all the conditions then existing, and that the amount named in the contract was not unreasonable, under the conditions.

The decree was, upon appeal by the Elfrida, substantially sustained as to all the findings above recited, except the last, and as to that a majority of the Circuit Court of Appeals held that the amount named was excessive, and reduced it from the sum contracted to be paid to $10,000.00. Circuit Judge Pardee dissented from this annulment of the contract in an opinion so lucid and strong as to justify, if it does not require, a thorough consideration by this tribunal of a case in which one of the ablest and most experienced admiralty judges in this country has arrived at an opposite conclusion from that reached by the two other members of the court.

6. The contract for salvage services and compensation should have been enforced, as it was shown, without conflict, that the salvor took no advantage whatever of his situation. The bargain made was not unreasonable. There was no evidence whatever of unfairness or bad faith on the part of the salvors, and the law of contracts is applicable to such agreements as this, at least to the extent of enforcing them in admiralty, where there has been a definite, distinct agreement, with ample time for the parties to consider what they were doing, and where the contract was considered by all at the time it was made to be fair and reasonable.

Post v. Jones, 19 How., 150.

The Agnes I. Grace, 2 U. S. App., 323; 51 Fed., 959.

Jones on Salvage, 99.

The conditions in this age are far removed from those prevailing in the fourteenth century, when the laws of Oleron were promulgated, cited in the majority opinion, and which were essentially directed to the prevention of piracy or extortion of agreements from small wooden vessels in distress upon the high seas, far from any relief, and completely at the mercy of the rescuer.

The just and enlightened rule is as stated in Harley v. 467 Bars R. R. Iron, 1 Sawyer, 2: "Parties may agree on the amount of salvage compensation, or on the principles upon which it shall be adjusted, and such agreement, *if fairly made and no advantage be taken of ignorance and distress, is readily upheld by the courts.*" As observed in that case, in an undertaking of this kind, much is conjectural and salvors necessarily take chances.

Was this agreement fairly made? The master upon shore was surrounded by his friends, and those whose interests were the vessel's interest, the ship's agents, the insurance agent, the pilots, in daily communication with his owners, and he himself testified that, if a storm came on, the vessel would be almost inevitably a total loss, having himself failed with anchors, tug boat and other appliances to get his ship off, and having badly strained her and lost a part of her equipment in so doing, the vessel daily settling in the sand, having applied to other sources of relief at hand, and having accepted the lowest offer, after having declined to submit the matter to the courts, being himself a mariner of thirteen years' experience and familiar with similar conditions; these facts, and, in fact, the entire record shows that the agreement was a fair and reasonable one and that no advantage of any kind was taken.

7. In such a case, as Judge Story remarked: "The court not only looks with indulgence upon such a contract, but endeavors to fortify itself against the exercise of mere discretion by adopting

and enforcing such a contract as equally just, moral and conscientious."

Bearse v. 340 Pigs of Copper, 1 Story, 323.

All such contracts are presumed *prima facie* to be fair, but if proven to be unconscionable, a court of admiralty, like a court of equity, would not enforce them.

In the Silver Spray (E. D. Mich.), 1 Brown's Adm., 349, the court found that although the bargain was a hard one for the libellant, that it would not be set aside for that cause alone. That he had ample time for consideration, and there was no pretense of any fraud or deception used towards him, or that he did not know the situation and the difficulties in the way. On page 354 the court says: "The contract appears to have been entered into openly and fairly in all respects, and there is no principle and authority upon which the court can disregard it, or make a new contract for the parties. It must be enforced as it stands."

As said in The True Blue, 2 W. Rob., 176, where the contract was enforced, although the disparity was great: "*Parties must understand that contracts fairly entered into will be strictly enforced in admiralty as well as elsewhere.*"

8. The case that we have stated is the substance of all the testimony, and there is no material conflict. The opinion of the majority of the Honorable Circuit Court of Appeals is mainly devoted to a consideration of the question as to what would be a proper and sufficient award of salvage in the first instance, independent of any agreement between the parties; in brief, the court treats the contract as nothing more than an indication of what the parties thought the work should or might be done for, but in no wise controlling. Even upon the basis of salvage, without an agreement

fixing compensation, Judge Speers seems to lose sight of the risk incurred by the salvors, and especially the risk of the time-limit of twenty-one days, but proceeds to declare, in effect, a new contract for the parties, such as they might have made had they known in advance the length of time and amount of effort it required, as shown by subsequent events. This is not the criterion. As we have remarked, *such a test applied to any contract in admiralty, or elsewhere, would, in the vast majority of cases, require a readjustment of the compensation.* This should not be determined by looking backward, but the court should, as near as may be, place itself in the position of the parties, and under the conditions and probabilities which existed at the time they formed the agreement. *Having done this, unless the amount agreed to be paid for a successful issue is so exorbitant as to shock the conscience, or to afford satisfactory evidence of fraud or duress, then the agreement should be enforced.*

Admiralty does not espouse as its wards the masters and owners of vessels who make their contracts upon land, with every facility for determining what course to pursue, and uninfluenced by the imminence of danger or distress, or absence of other means of rescue, such as confront a vessel wrecked upon an uninhabited coast or helpless upon the ocean.

The authorities reviewed in Judge Pardee's opinion vindicate its soundness, and we refer to that opinion as a part of this brief. It is a clear and true exposition of the facts of this case, and is in harmony with reason and the broadening spirit of modern jurisprudence and legislation, which, while according to individuals, the greatest latitude of conduct consistent with their duties as members of society, yet requires of them the discharge of their just obligations, and discountenances repudiation or paternalism, both of which are essentially involved in the defense.

The obligation of contracts, the freedom of this one from any taint of unfairness or compulsion, the hazard and exposure of the Elfrida, the risk, expense and success of libellants, all require the reinstatement and affirmance, in all things, of the decree of the District Court.

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Counsel for Libellants and Petitioners.

No. 715 Sect. 60.

Brief of Kirlin for Respondents

Filed Feb. 15, 1897.

SUPREME COURT OF THE UNITED STATES

Office Supreme Court
FILED
FEB 15 1897
JAMES H. McKENNEY

OCTOBER TERM, 1896

THE STEAMSHIP ELFRIDA
PYMAN, BELL & CO. Claimants, Appellants

against

CHARLES CLARKE AND ROBERT P. CLARKE
Libelants, Appellees

BRIEF FOR ELFRIDA, OPPOSING PETITION FOR WRIT OF CERTIORARI

CONVERS & KIRLIN
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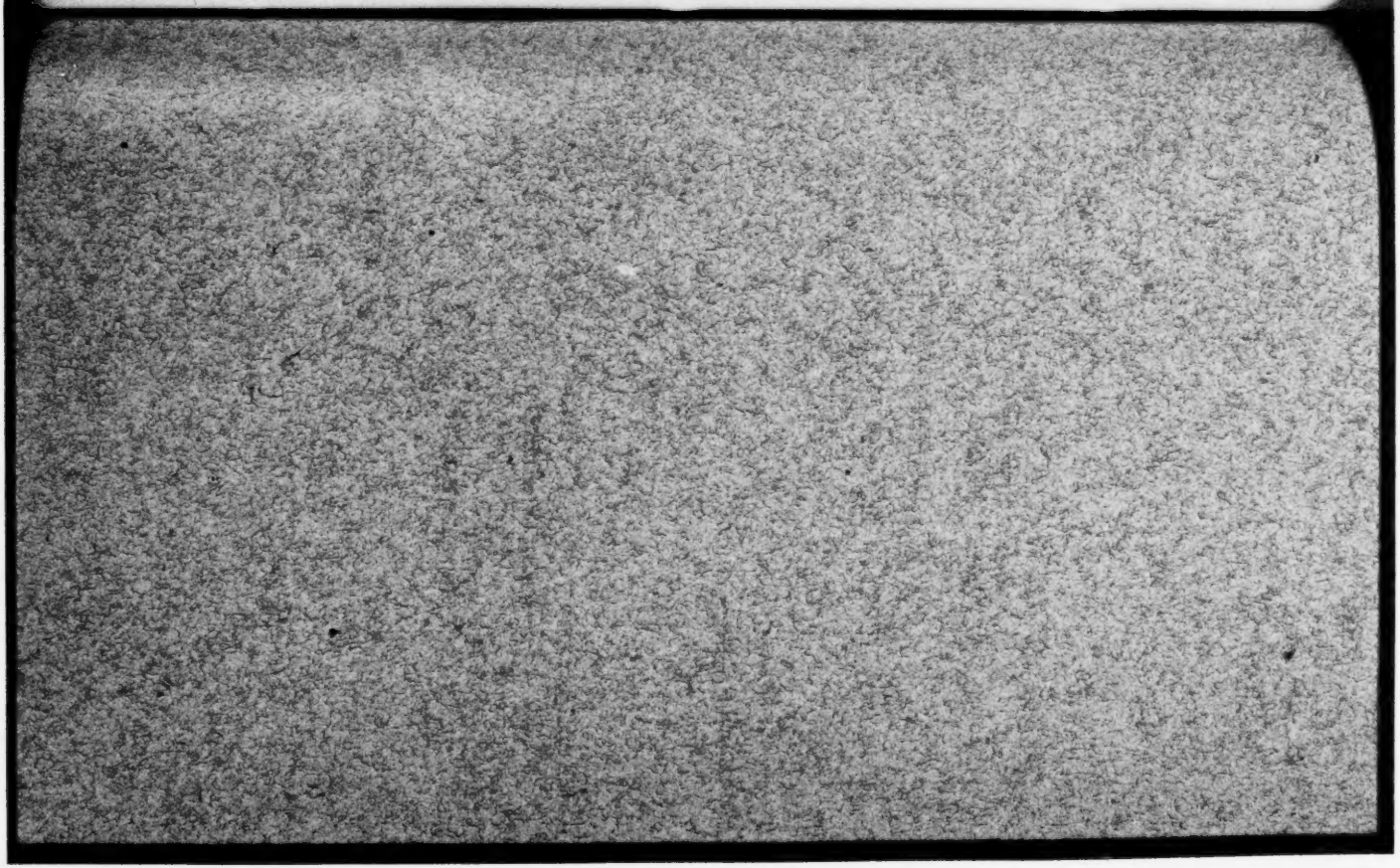

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United States Circuit Court of Appeals

FOR THE FIFTH CIRCUIT.

The Steamship "ELFRIDA," PYMAN, BELL & CO., Claimants, Appellants, AGAINST CHARLES CLARKE and ROBERT P. CLARKE, Libelants, Appellees.	No. 458.

Statement.

This is an appeal from a final decree of the District Court for the Eastern District of Texas, entered in favor of the libelants, October 29, 1895, awarding them the sum of $22,000, with interest and costs, for salvage services, found to have been performed for the steamship *Elfrida*, and her owners, under a contract with the master (pp. 327, 328).

The cause went to trial upon the libel filed October 24, 1894 (p. 9), the amended and supplemental libel, filed October 21, 1895 (p. 18), and upon the amended answer to the amended and supplemental libel, filed October 23, 1895 (p. 31).

In both the libel and the amended libel, the libelants rested entirely upon their contract, but in the amended libel they set forth the facts more fully and prayed "for such other, further and general relief, as in law and justice they may be entitled to receive."

The answer of the owners of the vessel, Pyman, Bell & Co., alleged in substance:

(1.) That the contract had been obtained from the master under circumstances which would justify a court of admiralty in setting it aside and awarding a salvage compensation upon the basis of *quantum meruit.*

(2.) That their cable authority to the master had been given upon partial information of the vessel's situation and peril, and furthermore, had been given with the qualification that he should only accept a tender made "if lower impossible," which instruction the master had been prevented from carrying out by information of the cable being conveyed to the salvors before the master saw them.

(3.) That the master's agreement was signed under mutual mistake of fact, or was obtained from the master by mistake on his part, which the libelants wrongfully took advantage of.

(4.) That it was improvidently made for a highly exorbitant and excessive compensation, without a proper or true understanding or appreciation of the situation, and the vessel's comparative freedom from danger.

(5.) That in making the contract, the parties were not acting upon a footing of equality, but that the libelants took undue advantage of the stress of the master's situation and the position of his vessel, and acted collusively with other salvors in obtaining from the master an excessive agreement for $22,000.

(6.) They further alleged that the libelants had not removed the steamship from the beach by the means they had agreed by the contract to use, but that, on the contrary, they received and used in addition to the means therein provided to be used by them, two of the steamer's anchors and cables, four of her winches and her windlass, and that accordingly, as strict performance of the contract had not been shown, the sum provided for in the

agreement should not have been awarded, but only salvage compensation on the basis of *quantum meruit*.

The facts and circumstances out of which the controversy arises are briefly the following:

On the 5th of October, 1895, the steamship *Elfrida*, a British vessel of 1454 tons net register, 290 feet long, 38 feet in breadth and 20 feet 1 inch in depth (fol. 562) was inward bound in ballast for the port of Velasco, Texas, in charge of a licensed pilot (fol. 320). Velasco is a few miles up the Brazos river.

To prevent the formation of a bar at the mouth of the Brazos, the United States Government has built jetties extending from the right and left banks of the river, a good distance out into the Gulf, estimated at about a mile (fols. 321, 435), the outer end of the jetties, for a distance of about 2,000 feet, being submerged (fols. 321, 435).

Whilst coming up the channel between the jetties in the afternoon of October 5th (fol. 322), the sea at the time being moderate, and there being but 5 inches between the bottom of the vessel and the bar (fol. 349), her heel touched, and an easterly wind swung her bow around against the submerged part of the west jetty (fols. 870, 910). A kedge anchor was put out from the bow to the eastward to haul her head away from the jetty, but the result of the operation was that in hauling the bow around, the stern moved and she then swung broadside to the jetty (pp. 314, 315). She lay substantially in this position until Saturday night, October 6 (fols. 322, 323), unsuccessful efforts being made in the meantime with the propeller and with kedge anchor to get her off (p. 108), when the sea having risen (fol. 326), she was carried over the submerged jetty (fol. 324) and a good distance shoreward on to the beach (fol. 326) about a cable's length to the westward of the west jetty (fol. 904), with her stern inside that part of the jetty which was above high water (fol. 430), which accordingly sheltered her from easterly winds (fols. 295, 343). She lay substantially parallel with the jetty (fol. 436), about 400 or 500 feet from the beach, head on (fols. 441, 764), and about 1,000

feet from water of sufficient depth to float her (fol. 764, amended libel, fol. 54).

The shore at this point is very flat (fols. 369, 382). Her draught at the time she went over the jetty was 11 feet 6 inches aft (fol. 804), and about 9 feet forward (fol. 912). The water, all the time while she lay there, at high tide, was about 8 or 9 feet, depending on the tide, which was irregular (fols. 871, 805, 718). It is admitted in the libel that she was in 9 feet of water at high tide (fol. 54).

The sand is quick at that point for about 10 feet down to the blue clay which underlies it (fol. 388). As the steamer lay in it she was in motion unless it was very smooth (fol. 451). She would settle in it to her usual draft when afloat (fol. 391).

By pumping out the water ballast, the steamer's draught could be reduced 18 inches, or to 9 feet (fol. 916). This appears to be conceded in the libel (fol. 54). She had on board 140 tons of coal, which could have been removed if required (fol. 333), but which it was not found necessary to remove. It thus appears that with the ballast pumped out, the steamer must have been very slightly aground at the top of a high tide, and that if the coal had been removed, the draught would have been correspondingly further reduced.

The agents of the vessel under the charter-party which she was preparing to enter upon, at Velasco, were J. Moller & Co., of Galveston. They had an office at Velasco, which was in charge of M. P. Morrissey. As soon as the report of the stranding reached Galveston, Messrs. Moller, on October 7, advised Morrissey by telegraph, as follows:

"Clark's tug, with hawser, gone *Elfrida's* assistance. Recommend Charles Clarke solely attend matter, he being very practical wrecker" (Ex. 10, fol. 715).

Morrissey admits having told Captain Burgess, of the *Elfrida*, that Mr. Moller recommended that Charles Clarke have sole charge of the matter (fols. 237, 239), and he telegraphed back to Moller & Co. at 4.56 P. M. of the same day, "Think *Elfrida* will accept Clarke" (Ex. 15, fol. 718).

There were but two firms at Galveston, with proper and sufficient plant to conduct the salvage operation on a vessel lying upon the beach. These were Charles Clarke & Co. and Fred A. Brock (fols. 512, 527, 490, 918, 924). Both had tugboats (fols. 187, 188). Clarke had heavy anchors necessary to be used in pulling a vessel off, but no lighters from or by which the anchors could be planted (fol. 161), whilst Brock, on the other hand, had lighters but no anchors (fol. 470). It was, therefore, necessary for the success of the operation that both should work upon it or the property of both be engaged in it, as the event subsequently showed (fols. 161, 548, 919).

Clarke started for Velasco October 7th (fol. 181) and appears to have entered into negotiations with Captain Burgess immediately (pp. 48, 49). Brock was already at Velasco, and had been working on the vessel with a small anchor and his tugboat previously. Finding Clarke upon the inside track, Brock, on the morning of the 8th, telegraphed Moller & Co., saying:

"I have been on ground and rendered assistance to *Elfrida*, running anchors, &c.; why shut me out altogether? Am able to furnish plant" (Ex. 18, fol. 719).

To W. F. Beers & Co., of Galveston, he wired on the same morning:

"If you are Lloyd's agent, why not let me work on *Elfrida*, as well as any other person? I was on ground and ran anchors out before *Seminole* (Clarke's tug) came" (Ex. 19, fol. 720).

To James Sorley, Lloyd's agent at Galveston, he telegraphed on the same afternoon:

"I have already rendered assistance to steamship *Elfrida*. Before you close with others, give me a chance" (Ex. 20, fol. 720).

Brock's efforts to interfere with Clarke's negotiations were stopped by the following answer from Moller, which Morrissey received from Galveston on the 8th:

"Inform Brock *privately*, as master of *Elfrida* called for assistance, we could not help sending Clarke, who had

only tugboat available. We have no objection to Brock continuing assisting *Elfrida*, making his own bargain, so long as *Whitejacket* attended to."

Morrissey admits that Brock had some conversation with him to the effect "that he did not want to be shut out" (fol. 242), and that after he received the message from Moller, above quoted, he showed it to Brock (fol. 244).

So far as the evidence shows, and it is very voluminous, Brock made no further efforts of any kind to be employed in the salvage service in competition with Clarke after putting in a larger bid than Clarke's on the 9th, although he was asked to underbid Clarke subsequently (fol. 796).

Brock died before the case came on for trial (fol. 244).

The master had been cabling to his owners, Pyman, Bell & Co., of Newcastle-upon-Tyne, England, almost daily, giving them partial information of the situation of the vessel and communicating certain fears on his part as to sand banking around her, which he says was done upon representations made to him by Clarke (fols. 797, 798). These cables will be considered more fully hereafter.

On October 9th, the master, upon the advice of Morrissey and of James McSorley, Lloyd's agent at Galveston, who was very aged, ill and infirm at this time (fols. 251, 422, 428), concluded to take tenders for the removal of the vessel from the beach (fol. 932). As was expected, only two tenders were received—one from Brock for $24,000, and one from Clarke for $22,000 (fols. 795, 796).

In a cable dated October 9th the master acquainted his owners with these tenders, recommending acceptance (fol. 840). To this he received in reply a cable from his owners on October 10th, as follows:

"Don't act without our instructions, Lloyd's underwriters communicating direct as consider tender excessive, try get condition in tender giving us right abandon vessel to salvors in lieu of salvage charges" (Ex. 27, fol. 724).

This answer was apparently communicated by the master to Clarke, who was still in Velasco (fol. 150).

Thereupon, and on the 11th, the master sent two further cables to Newcastle as follows, based, as he says, on Clarke's representations (fols. 797, 798).

In the forenoon (Ex. D):

"Delay will cause danger of sand banking, also increase cost of floating."

And in the afternoon (Ex. E):

"Fresh breeze blowing, vessel laying easy, making no water, afraid of sand banking up (fols. 841, 842)."

In explanation of those cables, the Captain says (fol. 797):

"Well, I sent this cable (Exhibit D) when Mr. Clarke said that if I did not receive word soon, he would want more for floating the ship, as there was a bank forming around her, and I cabled my owners to that effect."

The last one (Exhibit E) was sent upon similar representation (fol. 798).

The representation of sand banking up was entirely unfounded:

"Q. Now, captain, what was the actual fact as to this banking of sand around the steamer, at the time she was floated (October 17th, 6 days later)? A. It was hardly perceptible" (fol. 799).

"Q. Could you have told while on the vessel, by sounding or otherwise, whether the sand was forming around her? A. Yes (fol. 813).

"Q. Did you examine to see whether it was forming while she was lying there? A. Yes, sir.

"Q. What did you discover? A. I found the sand was not making any at all, or very little" (fol. 814).

The pilot says the only place it banked at all while she was ashore was in the eddy under her bow (fol. 338).

Acting upon the two cables of October 11th, which the owners supposed were based upon some visible indications of the danger suggested, they authorized the captain, in a cable dated October 12th, as follows (Exhibit 19, fol. 623):

"Accept tender 4,580, if lower impossible. No cure no pay. Try include in agreement, if steamer after coming

off not worth amount of salvage, steamer in damaged state to be taken in payment salvage."

This cable was received by the master at Velasco, in the afternoon of the 12th (fol. 203).

The telegraph office at Velasco is in the same building with that of Morrissey, and the captain states that when Morrissey handed him the sealed cable, he stated he had already wired Galveston that Clarke's offer was accepted (fols. 788, 790, 791, 804).

This was, however, disputed by Morrissey, but the record shows that on the 12th he telegraphed Moller as follows:

"Pyman cables accept Clarke's bid. Tell him better get here quickly" (fol. 685).

According to the telegraph record at Velasco, and the evidence of the telegraph operator, Clarke had learned of the master's cable or its purport before the master received it. The operator at Velasco, Vaughn, testifies as follows:

"Yes, I received telegram at 8 A. M. on October 12, 1894, from Charles Clarke & Co., Galveston, addressed to Captain B. Burgess, steamship *Elfrida*, Velasco, Texas, of which the following is a copy:

"'Galveston, Tex. 12th. B. Burgess, S/S *Elfrida*, Velasco. Contract price agreed upon. Get things ready to start. Charles Clarke & Co.'" (fol. 688).

At the trial, libelants called Vaughn, and attempted to show by him that 8 *A.* M. October 12th was an error for 8 *P.* M., and having been told that the master's cable was not received by him until the afternoon of the 12th, and being ignorant that communication might have been made through Lloyds' agent at Galveston or otherwise, he feebly admitted that it might be a mistake (fol. 463).

Under very leading direct-examination, he testified:

"Q. From the facts, I understand you to say with regard to these dispatches, that it was not likely it was received at 8 A. M.? A. I do not know. My records show the time of receipt and delivery" (fol. 463).

On his CROSS-EXAMINATION:

"Q. Did you not tell Judge Lockhart that you had no independent recollection? A. Nor have I.

"Q. Did you not tell him when you testified before [under commission], that you had your record slip before you? A. Yes, sir.

"Q. Was that a fact? A. Yes, sir; and I have lost it since.

"Q. You have been subpœnead by Judge Lockhart to produce that? A. Yes, sir: but could not do so, because I lost it.

"Q. You testified then with your record before you? A Yes, sir."

It thus appears that by his record, he had received the message at 8 A. M. on the 12th.

Libelants then called the telegraph manager, who stated that the original telegram had been destroyed, and produced what he claimed was a copy; but he testified (fols. 552, 553) that in comparing the copy, which he had made, and before the destruction of the original, his mind had not been directed to the question whether the hour was 8.25 A. M. or 8.25 P. M., and he did not compare it with the view of determining absolutely which was correct (fols. 552, 553).

Whether Clarke learned as early as 8 A. M. of the 12th of the master's qualified authority or not, the material fact is that he admits he learned from Moller, through Morrissey's telegram, or through Sorley, before he saw the captain again, that his bid was accepted (fol. 152); therefore, when he reached Velasco on the 14th, and the master attempted to carry out his instructions to try to obtain a lower offer, both Brock and Clarke knew the substance of his cable (fol. 799), and not only refused to take less but threatened to require more unless their offer was immediately accepted. The master says:

"They (Clarke and Clarke) told me that if the agreement was not settled, they would have to give it up. If we did not come to terms they would have to give it up.

"Q. What terms? A. This $22,000.

"Q. Did he give you any reason, or state why he had to give it up? A. He said that a bank might form around

the ship, and it would cost more to float her, and the risk would be greater.

"Q. Who told you this? A. Mr. Clarke.

"Q. Did you endeavor to solicit other people after receiving this cablegram that I quoted above? A. I saw Mr. Brock; that was the other party that attended.

"Q. What did he say about doing the work for a lesser price than $22,000? A. He would not do it." (fols. 795, 796). "Mr. Clarke said that if I did not receive word soon he would want more for floating the ship * * *" (fol. 797).

Morrissey and Sorley advised the master to accept Clarke's offer, and advised him against applying at New Orleans on the ground that it would cost more to obtain salvors there (fol. 802). The master thereupon, and on October 14th, accepted Clarke's tender—$22,000.

The contract was drawn up by Clarke and delivered to Mr. Sorley in Galveston (fol. 158). Mr. Sorley sent it over to Morrissey, who had it rewritten, without change, except the introduction of a clause limiting the time to 21 days (fols 215, 216, 268, 269).

The agreement thus made and signed on the 15th was as follows (p. 47):

"STATE OF TEXAS, }
County of Brazoria. }

THIS AGREEMENT, made and entered into this 15 day of October, 1894, between the Steamship *Elfrida* and the owners thereof, represented herein by B. Burgess, Master of said Steamship, as party of the first part, and Charles Clarke & Company, of Galveston, Texas, party of the second part.

Witnesseth, that for and in consideration of the covenants and agreements herein contained on the part of the said party of the first part to be kept and performed, the said party of the second part hereby agrees and binds himself, his administrators and assigns, to float and place in a safe anchorage, Quintana or Galveston, the said Steamship *Elfrida*, which is now stranded west of, and near to, the west jetty, at the mouth of the Brazos River, in said County and State, and furnish all labor and material, at the cost of said party of the second part, and to furnish diver and necessary apparatus to survey or examine the bottom of said Steamship, and to complete the same within twenty-one days from date hereof.

Said party of the first part agrees to pay said party of the second part, for such service, *i. e.*, when he shall have successfully floated said ship, as above set forth, the sum of twenty-two thousand dollars ($22,000). The said party of the first part, however, reserving the right hereby to abandon the ship to and in favor of the said party of the second part, in lieu of the said twenty-two thousand dollars, agreed to be paid as aforesaid.

It is further understood and agreed by and between the parties hereto, that should he fail to float and place in a position of safety, as above stated, said steamship, within the time hereinbefore specified, to wit, 21 days from date hereof, that said party of the second part shall receive no compensation whatever from said first party, for work performed, labor, tools or appliances furnished.

Anything that may be discharged to enable the vessel to float shall be replaced when she is in a position of safety.

It is also agreed and understood that the use of crew and engine shall be at the use and disposal of said party.

Witness the hand of B. Burgess, master of the steamship *Elfrida*, for himself, said ship, and the owners, party of the first part, and the hand of Charles Clarke & Co., party of the second part, this fifteenth day of October, 1894.

BENJ. BURGESS.
CHARLES CLARKE & CO.

Witness,
M. P. MORRISSEY,
J. H. DURKIE,
Master S/S *Lizzie of Whitby.*"

During the 13th and 14th, after he had learned through Moller that the master was authorized to accept his tender or that it was accepted, as Morrissey's telegram said (fol. 152), Clarke hired a small 45-foot schooner, of 15 tons burden (fol. 476), upon which he loaded some anchors, cables and provisions (fols. 473, 474). These he took to Velasco, in tow of the tug *Josephine*, on the 14th (fol. 187).

The schooner was hired simply to take the anchors, cables and provisions to Velasco, and was to receive $100 (fol. 476).

The contract appears to have been signed on the afternoon of the 15th, after the arrival of the expedition at Velasco (fol. 159).

A barge or lighter was required to plant the anchors, and these at Velasco appear to have been controlled by Brock.

On the subject of collusion between Brock and Clarke, Clarke testified upon his cross-examination:

"Q. When did you hire the lighter from Brock? A. It was the day I arrived there, the 14th, I think, *before the contract was signed*" (fol. 161).

Realizing the force and effect of this answer, he subsequently modified the statement by saying that he only asked him (Brock) "If I could get a lighter"; and later on he denied absolutely having seen Brock at all before the contract was signed (fol. 161). He admits having need of the lighter, and having arranged with Brock, and the cessation of the efforts to obtain the job, after Clarke appeared in Velasco, when viewed in contrast with his earlier telegrams begging to be "let in," and protesting against being shut out, tend to corroborate Clarke's first and significant statement, made before he appreciated the real effect, that he "saw Brock about the barge" before the contract was signed. It also appeared pretty clearly that Brock was interested in the contract (Ex. 52, fols. 736, 548, 821, 919).

On the 16th the anchors having been put upon Brock's barge, were planted, two of them together on the port quarter and two on the starboard quarter, about 1,540 feet astern of the vessel (p. 62). Two of the heavy anchors thus planted belonged to the *Elfrida*, and Clarke's rope cables were attached to the end of the steamer's anchor chain cables (p. 56).

The rope cables were then brought aboard the steamer and attached to her steam winches, which were located on deck. Two winches were attached to each rope, by first passing the rope around the drum of one and then forward around the drum of the second; thus four winches were brought to bear on the two heavy cables that went out to the anchors astern; a rope from the anchor on the starboard side was carried to the steamer's windlass, situated forward (pp. 56, 57, 110, 291). The tanks were then

pumped out, so as to lighten the steamer's draught (fols. 330, 331). All these arrangements were perfected during the 16th and on the 17th, up to 3 o'clock (fol. 900). Steam having previously been ordered both for the main engine, which operates the propeller, and for the steam winches, which are small hoisting engines situated on deck, the steamer began to haul herself off the beach under her own steam alone. No tugboat was attached to her (fols. 900, 170, 171, 172, 873, 875, 881, 895). She started almost immediately after the strain was put upon the rope, and went along with slight jerks and bumps until she was afloat (fols. 907, 901, 874), when, owing to the failure to place any anchor on her port side, the current which set towards the eastward, struck her port side and floated her over again on the submerged jetty; it took an hour or two to get her off the jetty (fol. 174) and she was finally floated in clear water and went off to sea under her own steam at 7.30 P. M. (fols. 950, 960), in about four hours from the time of starting to pull.

The pilot stood off to sea that night and brought her into Quintana, which is just at the mouth of the river, and about three miles below Velasco, on the following day, October 18th.

During the whole time that she lay on the beach the weather was fair and moderate and the sea smooth, except one day, October 15th (pp. 78, 114, 326, fols. 902, 905, 910, 928, 930, 936, 871, 872, 874, 875, 880, 881).

The vessel's position did not change at all from the time she was swept over the submerged jetty on to the beach on the night of October 6th until the salvors began to haul on her with the cables attached to the anchors on October 17th (fols. 326, 327).

Having been ordered to Newport News for dry-docking, to ascertain whether she had suffered any damage, it was found that no damage of any sort had happened to her, except on one plate on the turn of the bilge, and for the space of about a foot each way; the plate was dented in to the depth of about half an inch. This had probably been done by striking a rock on the jetty at the time she was borne over it (fol. 803).

Upon learning of the promptitude with which the vessel was removed from the beach, the owners of the vessel became suspicious that her actual situation had not been truthfully and fully presented to them, and on receiving a letter from the master dated October 7th, a day or two after the steamer was removed, their suspicions were further confirmed (p. 197).

They thereupon disaffirmed the contract (fol. 593), and offered in their pleading to submit to a decree for such salvage compensation as the Court might award (fol. 89).

The salvors refused this offer, and stood upon their contract, and the cause went to trial upon the issue whether recovery should be awarded upon the contract, and for the amount therein stated, or whether it should be based upon *quantum meruit*.

The District Judge, in the decree, found:

(1.) That the services were rendered by the libelants under a contract in writing made between them and Benjamin Burgess, master of the steamer.

(2.) That the master was duly authorized to make the contract.

(3.) That it was a lawful contract entered into by the master, with full knowledge or the means of knowledge of the master and of the owners of the steamship, of all the conditions then existing.

(4.) That the amount named in said contract was not unreasonable under the said conditions (fols. 981, 982).

Thereupon, the claimants appealed to this Court and assigned error, as follows (pp. 330, 333):

First.—For that the said Court found that the alleged contract for salvage was freely and voluntarily made, and was binding upon the *Elfrida*, and awarded judgment thereon for the full amount thereof.

Second.—For that the Court found that the master of the *Elfrida* was duly authorized to make the said alleged contract.

THIRD.—For that the Court found that said alleged contract was a lawful contract.

FOURTH.—For that the Court found that said alleged contract was entered into by the master of said steamship with full knowledge or means of knowledge of the said master, and of the owners of said steamship, of all the conditions then existing.

FIFTH.—For that the Court found that the amount of $22,000 named in said alleged contract as the price for the services to be performed was not unreasonable under the conditions existing when the same was entered into.

SIXTH.—For that the Court refused and omitted to find that the said alleged contract was signed by the captain under practical or constructive compulsion and duress, and was therefore not binding upon the property of the claimants.

SEVENTH.—For that the Court refused and omitted to find that the said alleged contract was signed by the master improvidently for an excessive and exorbitant compensation, and was therefore not binding upon the claimants' property.

EIGHTH.—For that the Court refused and omitted to find that the said alleged contract was obtained from the master through collusion between the libelants and the only other bidder for the work of salving the vessel, and that both of said salvors co-operated in performing the services and were interested in the reward.

NINTH.—For that the Court refused and omitted to find that libelants took advantage of the distress of the vessel's situation and of the apparent or real need of present assistance, and of the absence of other salvors, or means of salvage, to obtain a contract from the master for an excessive and exorbitant compensation; and that accordingly the said contract was not obtained in good conscience, and ought to be avoided and set aside, and salvage compensation given on the basis of *quantum meruit*.

TENTH.—For that the Court refused and omitted to find that the master was wrongfully induced to sign the said contract for an excessive compensation, by erroneous representations as to the probable future danger of the vessel from storm and shifting of sand, made by the libelants, or by others in their interest or behalf, upon whom the master was justified in relying for advice. That said contract was not his free and voluntary act, or that of the owners of the vessel, and should be disregarded and

suitable compensation awarded for the services performed.

ELEVENTH.—For that the Court refused and omitted to find that said alleged contract was made upon mutual mistake of fact as to the seriousness of the vessel's condition, and the difficulty of moving her from the strand, and for this reason should be vacated and set aside.

TWELFTH.—For that the Court refused and omitted to find that the qualified authority given to the master by the owners of the vessel was given upon imperfect and erroneous information furnished to them by the master, and without a true appreciation of the real situation or position of the vessel, and from want of information, and should not bind them or their vessel to the said contract, and that as soon as they learned the real situation they disaffirmed the contract, and offered to consent to a decree for suitable salvage compensation for the service actually performed.

THIRTEENTH.—For that the Court refused and omitted to find that the master failed to follow the instructions and authority of the owners to accept the sum of £4,580 sterling, only in case a lower amount was unobtainable, but, on the contrary, agreed to a contract in the said sum, without making any further or other efforts to obtain bids for a lower figure, and that, therefore, said contract was not made with the owners' authority.

FOURTEENTH.—For that upon all the facts and circumstances of the case, the Court omitted and refused to find that the alleged contract was for an exorbitant and excessive compensation, and ought to be set aside and disregarded, and an award made in such sum as the Court might find to be a suitable and reasonable compensation, as and for a salvage service performed independently of contract.

FIFTEENTH.—For that the Court refused and omitted to find that in any event strict performance of the contract had not been made by the libelants, in that they had not removed the vessel from her stranded position by means of their appliances and apparatus alone, and with the aid of the steamer's engine and crew, as provided in the contract, but that, on the contrary, the salvors obtained and made use of further apparatus and appliances belonging to the ship, to which they were not by the contract entitled, namely, four of the steamer's winches and her capstan, and two of the steamer's anchors, with their chain cables.

SIXTEENTH.—For that the Court awarded a final decree against the libelants, for the sum of $20,000, upon said alleged contract, with interest and costs.

SEVENTEENTH.—For that the Court refused and omitted to enter a decree in favor of the libelants for salvage compensation on the basis of a *quantum meruit* only.

POINTS.

I.

Of the nature and extent of the service performed and of the award which would be made for it by a court of admiralty, irrespective of contract.

As a means of determining whether the contract made was for an exorbitant and unreasonable compensation or was improvidently made, it is fair to examine the work done, by the standards usually adopted in determining the value of a salvage service, and to consider the amount for which an award would probably have been given apart from any contract. If it appears that the contract was for an amount very much in excess of what a court of admiralty would allow in the absence of a contract, good ground will be shown for setting the contract aside as unreasonable and inequitable.

In *Cope* v. *Valette Dry Dock Co.*, 119 U. S., 625, the Court stated the ingredients of a salvage service that affect the award as follows:

"1. Enterprise in the salvors in going out in tempestuous weather to assist a vessel in distress, risking their own lives to save their fellow creatures and to rescue the property of their fellow subjects.

"2. The degree of danger and distress from which the property is rescued; whether it were in imminent peril and almost certain to be lost if not at the time rescued and preserved.

"3. The degree of labor and skill which the salvors incur and display and the time occupied.

"4. Lastly, the value."

Remarking upon these ingredients, the Court said:

"Where all these circumstances concur, a large and liberal award ought to be given, but where none or scarcely any take place, the compensation can hardly be denominated as salvage service; it is little more than a remuneration *pro opere et labore.*"

It is to be observed that in this classification of the ingredients of a salvage service, the Court places the risk and enterprise of the salvors in the performance of the service first; the value of the salved property last.

According to Lord STOWELL, personal risk in the performance of the salvage service is the element which confers the best title to an ample award:

"What enhances the pretensions of salvors most is the actual danger which they have incurred; the value of human life is that which is and ought to be principally considered in the preservation of other men's property; and if this is shown to have been hazarded, it is most highly estimated."

The *William Beckford*, 3 Christopher Robinson, 355, 356.

Sir JOHN NICHOLL also took the same view.

The *Clifton*, 3 Haggard, 117, 121.

The most recent expression of judicial opinion in England in this matter was announced by Lord Justice LINDLEY, in the Court of Appeal, as follows:

"The first matter of consideration is the nature of the service rendered, the dangers from which the one ship has been saved and the danger to which the other ship has been exposed. Under this head have to be considered the skill and courage of the salvors, and the risk of life and death as well to the saved as to the rescuers. A salvage service which hardly exceeds ordinary towage is naturally remunerated on a very different scale from an heroic rescue from imminent destruction. The next matter for consideration is the value of the property saved."

The *City of Chester*, 9 Probate Division, 182, 202.

In the most recent work on this subject—that of Sir WILLIAM R. KENNEDY, one of the Judges of the Queen's Bench Division, on *The Law of Civil Salvage*, a subdivision of these main heads more convenient for discussion is suggested, with the following comments:

"Some circumstances are always material for consideration, and these have been ascertained by experience, and the Court has for its guidance a long course of judicial decisions to assist it in coming to a proper conclusion in each particular case. These material circumstances which Dr. *Lushington*, in his judgment in the *Charlotte*, 3 Wm. Robinson, 68, 71, calls 'the many and divers ingredients of the salvage service,' it is necessary now to consider in detail. These may be classified as follows:

(*A.*) *As regards the thing salved.*

1. The degree of danger to human life.
2. The degree of danger to property.
3. The value of the property salved.

(*B.*) *As regards the salvor.*

4. The degree of danger to human life.
5. Their skill and conduct.
6. The value of the property employed in the salvage service.
7. The danger to which the property is exposed.
8. The time and labor expended in the performance of the salvage service.
9. Responsibilities incurred in the performance of the salvage service such, *e. g.*, as risk to the insurance and liability to passengers or freighters through deviation or delay.
10. A loss or expense incurred in the performance of the salvage service, such, *e. g.*, as detention, loss of profitable trade, or repair of damage caused to ships, boats or gear."

Upon this subdivision Mr. Justice KENNEDY makes an observation similar to that made in the Supreme Court in the case of *Cope* v. *Dry Dock* (*supra*), as follows:

"Where all or many of these elements are found to exist, or some of them are found to exist in a high degree, a large reward is given; where few of them are found, or where they are present only in a low degree, the salvage remuneration awarded is comparatively small."

Kennedy, Civil Salvage, 119.

How many of these elements exist in the present case, and do those which are found exist in a high or low degree? The answer to this inquiry will suggest the amount which would be awarded apart from contract.

A. As regards the "Elfrida."

1. *The degree of danger to human life.*

It is nowhere suggested in the allegations or proofs that the lives of those on board the steamer were in any jeopardy by the accident or during the subsequent time that the vessel lay on the beach. The proofs expressly negative any such contention. The weather was fine during the whole of the time (p. 326), and there was communication with the shore by the vessel's small boat (fol. 906). The absence of such risk shows at the outset of the inquiry that the service is wanting in that element which has always afforded the most conspicuous argument for a liberal reward.

"However great may be the danger to the property itself, if it is wholly unattended with the risk to human life, it assumes much less value than when under circumstances where human life is put in peril."

Dr. LUSHINGTON in the *Thomas Fielden*, 32 Law Journal, Admiralty, 61, 62.

The *Bartley*, Swabey, 198, 199.

2. *The degree of danger to the Elfrida.*

This is the point of most importance in the case. It naturally divides itself into two subdivisions: (*a*) actual present danger; (*b*) dangers reasonably to be apprehended in the future.

(**a.**) *The steamer's actual present danger.*

It fairly appears from the libelants' evidence that the steamship was not and had not been in any actual danger of physical injury at any time after she stranded up to the time she was floated. She was directly head on to the

shore (fols. 441, 764, 915, p. 322), parallel with and about 300 feet from the west jetty (fol. 436). She was upright (fol. 330), and had made a bed for herself in the quicksand, in which she rested, moving with the agitation of the water (fols. 327, 451, 311), on the same draught at which she would have lain afloat (fols. 390, 391, 327). She lay about 2 feet in the sand at ordinary high water (fol. 935). She could have reduced her draught 18 inches or to about 9 feet by pumping out the water ballast (fols. 54, 916).

The tide, as appears from the blue print of the tide record produced by Lieut. Judson of the United States Engineers' Office at Galveston, page 153, was very irregular. This is taken at Galveston, but it would be substantially the same at Velasco (fol. 460). The mean low tide on the blue print is represented by the longitudinal white line. From the time the steamer stranded until she was removed, on the 17th, the high tide varied from about 2 feet 9 up to 3 feet 3, and down to 2 feet. The steamer did not, therefore, always have the same amount of water under her her at high tide, and this may account for the different depths of water stated by different witnesses. The steamer's witnesses showed that the vessel was lying in about 9 feet of water at the top of high tide (fols. 718, 805, 871), and this is expressly admitted in the amended libel (fol. 54).

It is proper at this place to point out that the claim made by some of the witnesses that the dispatch with which the vessel came off was accounted for by extreme high tide, is not borne out by the record. While the tide was higher on the 17th than it was on some of the other days of the month, it was not so high as it was on the 9th, 10th, 14th and 15th, nor higher than it was on the 15th, 16th, 18th and 19th. It was much higher later in the month (see blue print).

The depth to which the steamer was imbedded in the sand must have varied with the different stages and heights of the tide. The chief engineer, Dove, whose opinion on this point should be valuable, says: "We weren't bedded much in the sand" (fol. 897).

On the 9th, when there was a very high tide (see blue print) at noon, Morrisey, at 12.10 A. M., telegraphed

Moller & Co. that the *Elfrida* was "*swinging freely on high tides, showing no bed*" (fol. 722).

The ease and rapidity with which the vessel came off on the 17th, when the tide was about four or five inches lower than on the 9th, shows that the vessel could not have been very hard aground.

Her position on the beach was such that the sea affected her very little.

The testimony of libelant's witness, Hutchings, who has been Superintendent of the Life Saving Station of the Gulf of Mexico for 13 years, shows that the shore along the Velasco is very flat, sloping out gradually (fols. 369, 381). A depth of 9 feet of water would not be reached inside of 1,200 feet from the shore (fol. 382). To reach a depth of 14 or 15 feet, one would have to go out three-quarters of a mile (fol 382).

The worst break of the waves, he says, is in 12 or 16 feet of water, and only the spent force of the waves rolls from that point in upon the beach (fols. 382, 383).

As the steamship was lying in about 9 feet of water at her stern at high tide, it follows that she was well inside the point where the greatest force of the waves would be broken.

The testimony of Hutchings was confirmed by what actually occurred.

The master says there was no sea in and about where the ship lay (fol. 916).

By the log it appears that the steamer drifted over the breakwater about 8 P. M. of the 6th, with a considerable sea on, and that at 2 A. M on the 7th she drifted further on the beach (fols. 944, 946). From that day until the day she was removed from the beach, she lay in the same place without changing her position (Coveney, fols. 326, 327).

According to the log, there was only one occasion on which the ship bumped at all, whilst lying on the beach. On that day, October 10th, the log reports strong southerly gale and high sea, ship straining and bumping heavily (fol. 947).

On the 14th and 15th, the log reports very strong southeast gale, but the ship "lies fast on the ground," on both

days, and there is no report of any bumping (fol. 949). Bumping on the 10th is probably accounted for by the fact that with a southerly gale the incoming waves would strike the vessel slantingly on the port side, while, with a southeast gale, the waves would be directly astern, as she was lying about southeast and northwest.

Apart from these three days, the log reports fine weather, and the evidence of the captain is to the effect that the report of the weather in the log on the 14th and 15th is exaggerated (fols. 928, 929).

The master and the other witnesses for the steamer state that the weather was fine during the whole time that the vessel was on the beach (fols. 902, 905, 910, 927, 998, 871, 872, 874, 875, 880, 881, 930 and 936).

The testimony of the witnesses is corroborated by the official weather report (p. 326), from which it appears that the wind was blowing off shore during the time the vessel was on the beach, except on the afternoon of the 9th, and on the 10th, 11th, 12th, 15th, 16th and 17th. The maximum velocity of the wind, while the vessel was on the beach, was 28 miles on the 8th, but as this was from the north, it was off shore and would not affect her. On the days when the wind was blowing on shore, the 10th, 11th, 12th, 14th, 15th, 16th and 17th, the maximum velocity per hour was 14 miles, and from that down to 3 miles. It also appears from the same report that the weather was clear during the whole time.

The actual position of the vessel was not a dangerous one (915). Sand was not banking around her (fols. 799, 813, 814, 820, 338). It was a position from which she was easily and promptly removed. None of the libelants' witnesses pretend that her position was one of actual danger. The danger they spoke of lay in the future. It was potential and was based on the hypothesis of gales between the southeast and southwest.

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(b.) *Probable future danger of the vessel.*

Here we enter the region of speculation. The libelants called a large number of witnesses more or less expert to whom counsel described the position of the vessel, with more or less accuracy, all of whom united in saying that

in certain conceivable contingencies the vessel would probably have been a total loss. All these witnesses were subjected to cross-examination as to their actual experience. The result of this was that the witnesses were unable to point to a single instance where a large iron steamship ashore anywhere on the Texas coast had become a total loss. There was some evidence that some wooden vessels, which had no steam power to aid in getting them off, and which may or may not have been laden with cargoes unfavorable to their salvation, had broken up; some small iron boats had also been lost; one vessel which had stranded broadside on the beach had remained on about two months and broken her plating so that a witness could put his hand through it. Another witness described the stranding of a steamer a good distance further to the southwestward, where sand had banked on the in-shore side of her, so that a stork stood 10 feet from her on one leg (fol. 402). But this was on a different kind of shore (fol. 408). These vessels, however, were ultimately got off.

If we distill the evidence of the pilots and friends of the libelants, as to the probable danger of the ship's loss, its essence will be equivalent to the testimony of libelants' witness Hutchings, superintendent of the life saving station, whose evidence has been previously referred to, and who was their most competent expert.

Hutchings testified that there had never been an iron steamer lost on this coast from stranding, in his 13 years' experience (fol. 384). He only mentioned one instance of an iron vessel which had been seriously damaged (fol. 405), and that was on the part of the coast where the bottom was different from that at Valasco (fol. 408).

Considering the danger of a stranded vessel, on the coast, in connection with the probabilities of her ultimate safe removal, this witness testified as follows:

Q. Has there ever been an iron steamer lost on this coast from stranding in your experience? A. No, sir.

Q. Every one has been gotten off? A. Yes, sir. One was in an awkward position for ten or eleven days, and it was doubtful whether it would be gotten off or not.

Q. Has it not been the experience of persons knowing about matters of this kind that it is within a reasonable

certainty that a vessel stranded on a coast like this can be hauled off by means of anchors in the ordinary weather which prevails here? A. Yes, sir. I do not see why an ordinary vessel could not be hauled off with the ordinary apparatus if the weather is favorable, every-day weather,

Q. Is it not, therefore, that the preponderance of probabilities are in favor of a vessel getting off when she gets aground under ordinary circumstances along this coast? A. Yes, large vessels; small ones, no.

Q. Iron steamers in ballast? A. Yes, under ordinary circumstances.

Smith, another witness for the libelant, said: "You can almost take anything off the beach. The question is whether it is worth it. If it was up in the prairie it might be gotten off" * * * (fol. 289).

The preponderance of probabilities was always in favor of this vessel's safe removal from the beach. Her position, head on the beach, was most favorable. She was perfectly upright and at high water was lightly aground; at extremely high water she was afloat at the stern, and was moving in the water. She was able, by removal of her water ballast and coal, to lighten her draft so that she would not be aground, if at all, more than 6 inches in quicksand. She was undamaged, had the full use of her machinery and steam, and was in such a position that the jetties protected her from east winds. When the winds wore around from the east to the southward, they would not be likely to increase to gales, because when the wind works around with the sun, fair weather is portended (Coveney, fol. 341).

A season of the year had been reached when *severe* weather was not to be expected from points between the southeast and southwest. Hutchings said the October winds were generally northwest and northeast (fol. 374). Libelants put in a table compiled by the local forecast official of Galveston, from official records (p. 186), by which it appeared that for 20 years the prevailing direction of the wind in the month of October, was southeast, but with an average velocity of only 10 miles an hour; and that during the like period for the months of November and December, the prevailing direction of the wind was north

and the average hourly velocity 9 and 10 miles respectively.

Unless, therefore, it was to be assumed this October, November and December would be different from those of the preceding twenty years, the weather reasonably to be expected for the next two months was no menace to her safety, as the wind would be off shore most of the time, and when it came on shore would come with little velocity.

It has been shown by the evidence that the October in question was not an exception to the general rule. During that part of the month when the wind was from the southeast it was very moderate, and did not affect the vessel, and during all the remainder of the month, after she got off the weather is stated to have been fine (p. 326).

We think it is fair, therefore, to say that the libelants' evidence tended very strongly to exaggerate the probable future danger of the vessel. Her situation was rather one of deadlock than of danger. She was out of her element and needed assistance to get off, but with the assistance of anchors and chains there was no reasonable probability that she would not get off, and get off in safety. If she had been supplied, or could have obtained additional anchors, it was the belief of the pilot (fols. 334, 348) and of the master that she could have got herself off. The experienced libelants, who had never failed to get a vessel off (fols. 416, 410, 427, 430), were almost certain of success. The promptitude with which their efforts were crowned with success shows how easily the vessel could be removed, and how lightly she must have been stranded.

3. *The value of the property saved.*

The libelants introduced no evidence upon this subject. One of the owners, Mr. Bell, who had been manager, or part manager, of more than twenty steamers in twenty-five years, and at the time of his examination was the largest owners of shares in the eleven steamers operated by his firm, Messrs. Pyman, Bell & Co.; who had been for many years interested by ownership in about thirty

steamers under the management of other firms; who had been for many years a director of several steamship mutual associations in West Hartlepool, Whitby and London; and who had negotiated the purchase and sale of steamers for many years, states that a liberal estimate of her value, after having been taken to Newport News and repaired, would be £14,000 (pp. 188, 189). The amount for which she was insured was £18,000, subsequently reduced to £16,000, but those amounts were book values only and had regard to the fact that the steamship was bought at a time when steamship tonnage was 15 per cent. dearer than it was at the time of the salvage service (fol. 565).

As the libelants have adduced no evidence in contradiction of this, the value of the vessel should be taken, for the purposes of the suit, at approximately $70,000.

B. As regards the Salvors.

4. *The degree of danger to human life.*

There is no intimation in the libelants' testimony that there was any danger to their lives in the performance of the service. Claimants' witnesses testified that there was no such danger (fol. 875). The weather was fine when the salvors came and the sea was smooth, and both continued the same during the two days the salvors were at work (fols. 880, 881, 900, 908, Official Record, p. 326).

5. *Their skill and conduct.*

The circumstances were not such as to require the exercise of a high degree of skill or the exhibition of intrepidity or heroism on the part of the salvors. Their plant was conducted from Galveston to Velasco upon a small schooner in tow of a tugboat. We know by the weather record (p. 326) that the weather was fine during the passage. At Velasco anchors were transferred to Brock's barge, and from the barge were planted on the steamer's starboard quarter (fol. 900). They then took the steamer's anchors from the bow onto the barge and planted those upon the other quarter. The fifth anchor was placed

on the starboard side. Rope cables were attached to the chain cables and carried aboard the steamer, each cable being put around the drum of two winches. The vessel's winches did the pulling, by the aid of which she was floated (fols. 171, 172, 873, 875, 881, 895, 900).

6. *The value of the property employed in the salvage service.*

This the libelants have not attempted to show by any competent evidence. Libelant Clarke did not touch the subject at all, though twice examined. There are vague statements at different places in the testimony that a plant of considerable value was in use, but no definite information as to its value appeared to be obtainable. It was suggested that two tug boats and two schooners, with a large number of anchors and cables, had been used, but upon cross-examination of Captain Clarke, it appeared that only one tug and one schooner were used (fol. 187), with Captain Brock's barge. The value of the tug was not shown; moreover the tug was not used, except to free the vessel when she touched the jetty, after being carried over against it by the current, owing to the absence of any anchor on the port side. The steamer was then in deep water, and the touching upon the jetty was evidently a trifling matter. The schooner did not belong to Clarke, but was only chartered to take the anchors down from Galveston to Velasco. The agreement of charter was $35, but $100 was paid (fol. 476). Brock's barge is said to have been worth about $6,500, but there is no suggestion that it was actually in any peril (fol. 164). Some of the witnesses testified that a large number of men, as many as 25 or 30, were taken down from Galveston, but Clarke himself admits that 15 or 16 all told was about the number (fols. 156, 157). The number of anchors was not clearly shown, nor was any attempt made to state their value, nor that of the cables. $20,000 would apparently be a liberal estimate to cover the value of the property employed by the salvors in the service.

7. *The danger to which the salvors' property was exposed.*

The salvors did not themselves testify to any danger to their property, in the condition of wind and sea which actually prevailed. Clarke said not a word on the subject. This point, therefore, need not be discussed.

8. *The time and labor expended in the performance of the salvage service.*

Clarke appears to have received notice from Moller on the 11th or 12th that his bid was accepted. It was not actually accepted, but let that pass for the present. He thought it was accepted, and on the 13th and 14th was making his preparations in Galveston (fol. 154). On the 14th he went with his tug and schooner and outfit from Galveston to Velasco (fol. 187), where on the afternoon of the 15th the contract was signed. On the 16th and on the 17th until about three o'clock (fol. 900) the salvors were engaged in laying the anchors and connecting the tackle with the vessel. They began to haul at about three or half-past three (fol. 900), and at half-past seven the ship was free of the ground and proceeded to sea (Mate's log, fol. 950; Engineer's log, fol. 960). The whole of the time occupied in hauling her off the beach after they began to pull was therefore about four hours (fols. 873, 889, 900, 901, 910).

9. *Responsibilities incurred in the performance of the salvage service, such as, e. g., risk to the insurance, &c.*

No evidence produced by the libelants upon this subject.

10. *Loss or expense incurred in the performance of the salvage service.*

There was no evidence of any items under this head.

An analysis of the service, by considering its elements separately and apart, shows that it was not such as would ordinarily induce a court of admiralty to give a liberal award.

In its essential features, this case is strikingly like the case of The *Hesper*, 18 Fed. Rep., 696, where the Circuit Court of this circuit reversed the decree of the District Court for the Eastern District of Texas (18 Fed. Rep., 692), and reduced the salvage from $8,000 to $4,200. A comparison of the two cases shows the following results:

1. The *Hesper* stranded December 12, 1882, on Galveston Island.	1. *Elfrida* Stranded October 5th, near Velasco.
2. Her value was £22,000.	2. Her value about £14,000.
3. Her net tonnage, 1,069 tons.	3. Net tonnage, 1,454.
4. Supplied with winches and windlasses.	4. Ditto.
5. Had a cargo of 900 tons of salt.	5. No cargo.
6. Went ashore at a speed of about 4 knots an hour.	6. Drifted ashore.
7. Struck easily, without shock, and remained upright.	7. Ditto.
8. Her draught, 13 feet 9 inches.	8. Draught 11' 6" (fol. 804)
9. Sea smooth; very little wind from the south.	9. Sea moderate; wind S. E.
10. Ship headed Northeast by North.	10. Headed about N. W.
11. Efforts made with Kedge anchor and engines to heave her off.	11. Ditto.
12. Assistance called for from Galveston.	12. Ditto.
13. December 12, P. M., small tug *Estelle* sent to her assistance.	13. Oct. 6th and 7th, Brock's tug assisting.
14. Ineffectual efforts made by *Estelle* for two hours to float the ship.	14. Efforts of Brock's tug ineffectual.
15. Sea subsequently became turbulent.	15. Ditto one day.
16. *Estelle* left the *Hesper* the same night.	16. *Elfrida* awaiting assistance 4 or 5 days.
17. December 13, the *Hesper* shifted her position slightly; pumped up her ballast tanks; threw cargo overboard.	17. *Elfrida* remained in same position.
18. December 13, tug *Buckthorn* and a steam lighter took a heavy anchor and cables and two hawsers to the steamer.	18. Oct. 16th, *Josephine* and barge planting anchors.

19. On the 14th *Buckthorn* planted the anchor at sea in 18 feet of water, and carried her cables 210 fathoms to the *Hesper's* steam winch.	19. Oct. 17th, ditto until 3 P. M., and bringing cables to winches.
20. Same day men engaged throwing over cargo.	20. Pumped out ballast.
21. *Hesper* hove on hawsers and used her engines, *Buckthorn* assisting with line, with no effect.	21. Same day *Elfrida* hove on hawsers and used propeller. Came off in 4 hours.
22. December 14, tug *Estelle* arrived alongside; another lighter came alongside; taking off cargo.	22.
23. Same day, when a third of the cargo had been removed, and the water ballast pumped out, the steamer was got off by the use of her own engines, and her steam winch pulling on the one anchor, *Estelle* and *Buckthorn* assisting by pulling on line.	23.
24. Time employed in the service, three days.	24. Two days.
25. Value of salvors' property employed, about $35,000.	25. Say $20,000 (big estimate).
26. Place where *Hesper* was stranded, slope of ground seaward was gradual, bottom sandy.	26. Ditto.
27. During the time the *Hesper* was aground, there was no wind or sea of any danger to ships, and the services rendered to the *Hesper*, aiding her to get off, were not attended with any hazard or danger.	27. Ditto.
28. The value of the *Hesper*, which was entirely uninjured, was $100,000, and her cargo, $6,500.	28. Value of *Elfrida*, say $70,000 No cargo.
29. The *Hesper* had no protection against wind or sea, from any direction.	29. *Elfrida* had protection of jetties against all winds from N. E. to S. E.
30. The amount of the award in the *Hesper's* case, $4,200.	30. $22,000, with interest.

The only material point upon which no comparison between the cases is made relates to the extent to which the vessels rested in the sand. From the comparatively greater ease with which *Elfrida* came off, it is a fair inference that she was not harder aground.

By analogy to the *Hesper* case, it would appear that an award of $5,000 might reasonably have been expected for such a service if the amount had been left to the Court.

We have not been able to find any other reported cases bearing close resemblances to the present. It may be instructive, however, to notice a few cases where the peril was much greater and more imminent, the service much larger and more arduous, the values risked and saved far above those involved here, where the Courts have nevertheless awarded relatively not more than one-third of the amount here recovered.

Guadalupe, 20 Fed. Rep. 443.

In *Pent* v. The *Ocean Belle*, 19 Fed. Cases, 200:

A ship with cotton, stranded 30 miles from Key West, and was hauled off in good weather by 8 wrecking vessels, with 64 men, and a steam propeller with 21 men, after lightening her of 1140 bales of cotton. She was then towed around an extensive shoal, about 70 miles, to the harbor of Key West. MARVIN, *J.*, awarded $13,000 upon an aggregate value of $165,000, it appearing that had the weather been bad, the ship would have been in great peril of total loss.

In the *Diadem*, 7 Fed. Cases, 632: A ship and cargo, of the estimated value of $125,000, on a voyage from New York to New Orleans, got ashore on Long Key, where she was in imminent peril of total loss, from which she was saved by the libelants with their vessels, which carried 68 men and 28 men in small boats. For this service MARVIN, *J.*, decided that $12,000 would be reasonable salvage; but that in consequence of negligence and errors of judgment of the salvors and delay in getting the vessel off the reef, this amount should be diminished one-half.

In the *North Erin* (71 Fed Rep., 430, deficiently reported), a large steamship with a cargo consisting chiefly of green

fruit, ran ashore on the outer end of Long Island, at a speed of 7 knots in fog, and at the top of high water. She was immediatly swung around by the sea until she lay broadside on a quicksand beach, in which she settled about one and a half feet. She was unable to move by her own power or anchors, and in case of a rising sea would have been in a critical position. A powerful wrecking tug, of large value, with the owner aboard, came 80 miles to her assistance, and at the next high water, after pulling about three hours, having the assistance of the steamer's engine and sails, dragged her off into deep water. The tug was engaged going and coming for two days and supplied hawsers and appliances. The green fruit would have been greatly damaged by any considerable delay. Neither ship nor cargo suffered any damage. The salved values were about $100,000. The Court, upon the special facts, awarded $10,000.

By this comparison of results it appears that the libelants have recovered three or four times as much as any Admiralty Court presumably would have allowed them. So great an excess in their agreement, we submit, is unreasonable and inequitable towards the property charged with its payment, and fairly justifies an Admiralty Court, as a court of equity, in setting the contract aside.

II.

The District Judge erred in holding that the libelants performed the contract in strict accordance with its provisions, so as to entitle them to the payment of the agreed sum. He should have found that the libelants used means and appliances belonging to the ship, in addition to those specified in their contract, and that, accordingly, compensation should not have been awarded under the contract, but only on the basis of *quantum meruit*.

The agreement provided:

"That for and in consideration of the covenants and agreements herein contained, on the part of the said party

of the first part to be kept and performed, said party of the second part agrees and binds himself * * * to float and place in a safe anchorage, Quintana or Galveston, said steamship *Elfrida* which is now stranded * * * at the mouth of the Brazos * * * and *furnish all* labor and *material at the cost of said party of the second part*" (fols. 139, 140). * * * "It is also agreed and understood that the use of crew and *engine* shall be at the use and disposal of said party." * * * "Said party of the first part agrees to pay said party of the second part for such services, that is, *when he shall have successfully floated said ship, as above set forth*, the sum of $22,000" (fol. 140).

It will be observed that there is no provision in this contract for the use of any of the ship's appliances except the *engine*. Unless, therefore, libelants removed the vessel from her stranded position with their own appliances "and material" and without any appliances of the ship except "*the engine*," strict performance of the contract has not been proved, and as such strict performance was an issue in the case, libelants would not be justly entitled to recover upon the contract, although, under the admission of the performance of salvage services in the claimant's answer, they would be entitled to such salvage compensation as the Court might award.

At the hearing of the case (p. 46), counsel for the libelants put in the contract (fol. 138), and then called Charles Clarke as a witness. Upon his cross-examination he admitted that he used two of the ship's bow anchors, which weighed about 3,000 pounds apiece; that he used the ship's [anchor] cables, making his own hawsers fast to the end of them (p. 56), and that, in addition to the use of the engine (which operates the propeller) (fols. 171, 881), he used the steamer's "winches" (pp. 56, 57). It further appeared that in addition to using the steamer's four winches (fols. 329, 873, 881, 335) libelants availed themselves of and used her steam windlass (fols. 873, 329).

Upon this state of the evidence, objection having been made that strict performance of the contract was not proved, but, on the contrary, the evidence showed that ship's appliances not contracted to be used had actually been used in floating her, and the District

Judge having stated to counsel that he was unfamiliar with winches and engines of steamships, the claimant called as an expert James Band, a marine engineer of twenty-five years' experience, fifteen of which had been spent at sea, who was then chief engineer of the steamship *Ludgate*, of London, which was lying in port (fol. 535).

Mr. Band's evidence (pp. 179–181) was as follows:

"Q. What experience have you had? A. Eighteen years at sea; twenty-five years at the business altogether.

Q. Will you describe to the Court what a steam winch is, and where it is located, and how many there are? A. In ordinary cases there is one at each hatch, and in some cases there is two on the bigger class of ships.

Q. Do you know the *Elfrida?* A. I have seen her once or twice in different harbors.

Q. How many winches did she have? A. I could not say exactly, because I had no interest; merely seen her as another ship in harbor; but, according to her build, I should think she had four holes [holds?], and in that case she would have four winches and windlass.

Q. Will you describe the construction of the steam winch; what is it? A. It is a hoisting engine for taking cargo in and out.

Q. And there are four of them? A. Yes, sir; on that class of ships there is one at each hole [hold?].

Q. Is it fixed on deck? A. Yes, sir.

Q. Is there any connection between that and the engine's boiler? A. None.

Q. Is a steamship fit for use, in every way, without any winches at all? A. Yes, sir.

Q. From what source is the steam to the winches supplied? A. In ordinary cases there is a winch boiler—what we call a donkey boiler.

Q. From what source is steam supplied to the main engine, or that which drives the engine? A. From the main boiler.

Q. On board a ship in port, when you receive, as engineer, an order to get up steam, what do you get up steam for? A. For the main engine.

Q. Is it part of an engineer's duty to get up steam on the donkey boiler to run the winches, without an order for steam for the winches? A. We have to put it in the log book what the steam is for, and where it is to be applied.

Q. Are winches built in England by the same firms who build engines? A. No, sir.

Q. They are furnished by different builders? A. Yes, sir.

Q. Describe the steam windlass of a ship, and where it is situated? A. It is placed in the stem of the ship and sometimes it has an engine of itself, and other times it is only a windlass, when we generally call it the forward winch.

Q. Do you know which the case was on the *Elfrida?* A. I do not.

Q. The steam windlass, as I understand it, works perpendicularly? A. That is the capstan; the windlass is a horizontal shaft.

Q. And winches have horizontal shafts, also? A. Yes, and some vertical. The older style was diagonal and the new style is horizontal.

Q. In fact, besides the main engine which drives the ship on vessels of this class, to the best of your recollection on the *Elfrida* there were four or five smaller engines? A. Yes, sir.

CROSS-EXAMINATION:

Q. A winch is a hoisting or winding engine? A. Yes, sir.

Q. And a steam capstan is sometimes also an engine? A. Yes, sir; or it can be driven from another engine.

Q. If it is operated by steam, the propelling power is furnished by an engine? A. Yes, sir.

Q. And are not winches sometimes driven by steam from the main boiler as well as by the donkey boiler? A. It is possible.

Q. When they want engine power and they have all the winches running at the same time, don't they supply the steam from the main boiler? A. Yes, when it is wanted in emergency.

REDIRECT EXAMINATION:

Q. Suppose a ship is on the beach and a contract is made with the salvage company [salvor?] by which he agrees to furnish material and appliances to get her off; suppose that he is to have the use of the steamer's engine, as an engine [engineer?], would you understand that to include the use of the winches?

Objected to as a matter of opinion. Objection overruled.

A. No, sir."

At the conclusion of Band's evidence, Captain Clarke was recalled, and made an effort to vary the contract by parol evidence that it was agreed that the salvors should have

the use of the winches in addition to the main engine, but upon objection the Court excluded the evidence (fol. 543). There was no such issue.

Further examined on the same line, Captain Clarke testified:

"Q. Is it necessary to use the engines in using the winch? A. No; there is a regular donkey engine, and you can either supply the steam from the donkey engine or the main engine" * * * (fol. 543).

"Q. The engine runs the winch? A. Yes, sir; the *steam* runs the engine *and the winch*" (fol. 544).

"Q. The main engine has nothing to do with the donkey engine? A. No, sir" (fol. 545).

Clarke had the right idea, but was confused by his counsel's assumption that it is the engine instead of the *boiler* that runs the winches. The engine is that large and complicated machinery by which the propeller is revolved.

In the Century Dictionary, an "engine" is defined as: "a machine for applying any of the mechanical or physical powers to effect a particular purpose; especially a self-contained, self-moving mechanism for the conversion of energy into useful work, as a hydraulic engine for utilizing the pressure of water; a steam, gas or air engine in which the elastic force of steam, gas or air is utilized."

It appears, therefore, that in the ordinary, as in the technical use of the term (as explained by Band), the boiler is no part of the engine; that the winches are no part of the engine. Steam from the main boiler runs the engine; steam from the donkey boiler commonly runs the winches, but the winches may be run by steam from the main boiler. The winches are hoisting engines; each of them is a separate engine; there were four of them on deck besides the windlass, all of which libelants used, in addition to the main engine which they used on the propeller. *The winches are not and cannot be operated by the engine.* Therefore in using the winches and windlass, libelants did not use the engine, but used four or five separate and additional engines besides "the engine."

This being the only evidence in the case upon the subject, it clearly appears that the libelants not only used the engine, the right to which was secured to them by the contract, but they used the winches and windlass, the right to which was not secured to them by the contract. The pleadings do not allege any supplemental contract, hence the master's implied assent to their use is immaterial. His assent to the use of the anchors, cables and winches shows nothing more than that he was willing the salvors should use every available means to float the ship, because of his anxiety to get her off (fol. 936). It is not equivalent to an admission that anchors, cables and winches are an "engine," and has no relevancy or bearing in the present suit between the salvors and the shipowners' property where the question of strict performance is in issue.

There is no shadow of claim that the right to use the anchors was secured to the libelants by the contract. That they did use them they freely admit; that libelants needed them is also shown by the evidence that Clarke brought only three anchors with him (fols. 874–5) and telegraphed to Galveston for another to be brought down on a chartered schooner (fol. 725). The answer was that one anchor was there (fol. 725). A schooner appears to have been chartered to bring it down, but it was not used, if it arrived (fol. 187). He claimed to have had others at hand, but there was no specific proof upon the subject, and he was unable to give any satisfactory reason for asking his son to send another (fol. 548).

Clarke, recalled, feebly pretended that he took the anchors off the bow to lighten the ship (fol. 545), which he was entitled to do under the contract. But obviously the right to take them off so as to lighten the ship did not imply the right to bury them in the Gulf a thousand feet away from the ship and use them and the ship's chain cables in getting her off the beach.

The issue of strict performance of the contract having been clearly presented in this cause, to which the master is no party, and having been carefully litigated, and it appearing indisputably that the contract was not strictly performed according to its provisions, the District Judge,

we submit, erred in awarding compensation as and for a right and true performance. He should have awarded simply a salvage compensation on the admissions of the claimant's answer.

Boudies v. Sherwood, 22 How. 214

III.

The Court below erred in awarding recovery for the full amount stated in the agreement.

No formal opinion was filed by the District Judge, but it appears from the final decree (p. 327) that the Court found from the evidence "that such contract was a lawful contract, and that the same was entered into by the said master of said steamship with full knowledge or means of knowledge of the said master and of the owners of the said steamship of all the conditions then existing, and that the amount named in said contract was not unreasonable under the said conditions" (fols. 981, 982).

It will be observed that the Court makes no finding upon the point whether the amount of the award, $22,000, was a reasonable or unreasonable reward for the services actually performed.

In asking this Court to disregard the contract as unreasonable and for an excessive amount and to modify the decree by awarding the salvors a salvage compensation on the basis of *quantum meruit*, our first inquiry must be whether the case of the *Agnes I. Grace*, 2 U. S. App., 317, decided by this Court, stands in our way. This was the case chiefly relied upon in the District Court, and upon which apparently the District Judge relied. A brief review of that case is, therefore, necessary. We take the facts as reported in the opinion of the District Judge.

The *Agnes I. Grace* was a schooner bound for Port Royal, South Carolina, loaded with a cargo of jute bagging, which had put into Tybee Roads, at the mouth of the Savannah River, under stress of weather. Coming in

at high tide, and being off her bearings, she had "passed over shoals where at low water the depth is from one to three feet for more than two miles by the scale, and that the point where she finally went hard aground was on a spot marked on the chart as 'dry.'"

This position was found to have been one of very great peril:

"She was exposed to the full force of the sea and the winds, should winds from the northeast, east or southeast prevail, and indeed, the evidence is that she was as much exposed to the winds from those directions as if she had been entirely outside of the bar, and on a shoal exposed to the full force of the Atlantic rollers."

Libelants' expert, Captain Hutchings, the superintendent of the Life Saving Station, knowing the comparative danger of vessels stranded in the Gulf and on the Atlantic coast, testified:

"Q. You do not mean to say that this coast along here is as dangerous for a vessel to strand upon as the North Atlantic or Carolina coast? A. No, not in the general acceptance of the term.

"Q. That coast is much more exposed to more violent storms? A. Yes, sir. It has the broad Atlantic Ocean to sweep against it" (fol. 383).

The *Grace* was sunk from two and a half to three feet in the sand, and a hole had been knocked in her bottom on the starboard side on the turn of the bilge, probably by contact with the anchor, admitting water into the hold. The sea rose and fell in the vessel with the rise and fall of the tide. She was in quicksand, and the testimony in the present case shows that a wooden vessel with her bottom broken, stranded on a quicksand beach, is practically lost.

Judge SPEER said (2 U. S. App., 323):

"It is also true in the opinion of the Court, that the skill exerted, and the labor expended, were great; that the libelant labored for several days, when making this rescue; and after the rescue was made, it was only by the presence of its powerful steam pump continually exerted,

that they were enabled to keep the vessel afloat; and only with the presence of that steam pump, a wrecking pump worked by the assistance of the steam of a tug, and at imminent hazard to the tug, wac it possibble so to relieve the vessel of the water in her hold as to enable her to float. The testimony of Willink, the ship carpenter, who repaired her, is that she barely escaped sinking in the river at his yard, when the pumps were stopped for a short time."

The cargo saved amounted to $7,000, and the Court found that the price at which the bark sold, namely, $5,030, was only a moiety of her value. The salved value should, therefore, be taken at about $17,000.

The Court upheld the contract for $5,000 for salvage, and added the sum of $210 to the contract for pumping services in keeping her afloat after she was floated, but upon the express finding (2 U. S. App., 322), that "*the contract stipulates for but a moderate charge for the services* RENDERED *in this case, and it is perhaps true that if a larger demand had been made, a larger allowance would have been permitted by the Court.*"

As to the weight and bearing of the contract upon the amount of the award, Judge SPEER further, and as we submit correctly, said (p. 322):

"It is true, as is insisted by the respondents' counsel, that a contract of this character is not binding upon the Court, and that in all cases of salvage it is competent for the Court to adjudge and assess the amount of the recovery in accordance with the equities of the case, and, if it should appear that a contract of this character was an inequitable one, the Court would, of course, disregard it. But, whenever a contract has been entered into after due deliberation by the parties, and has not been shown to be in any respect an inequitable one, it is exceedingly valuable as evidence to enable the Court to arrive at a just determination. The Court regards this contract as evidence in that light, and not as a conclusive contract; but it is a most significant and valuable indication of what should be the true amount of the recovery."

Upon the appeal, similar observations were made in the opinion of Judge LOCKE (p. 329) and at the conclusion of the opinion (p. 330) he said:

"Before the performance of the service, the agreement appears to have been considered by all fair and just, and if so, then it cannot now be considered otherwise, because of its successful rendition by the appellees, who had assumed all expense and risk. Although the amount given may, under the circumstances, appear high in proportion to the value of the property saved, this Court does not deem it sufficiently unreasonable to disturb the judgment of the Court below."

It must be remembered that these words were spoken in a very different case from the present. In the one case, the vessel was a wooden schooner, with a hole in her bottom, and the water rising and falling inside of her with the rise and fall of the tide, while in the other, we have a staunch iron steamer, wholly undamaged. The schooner was lying where at low tide she was more than two miles from water sufficient to float her, while the steamer had not crossed any bar, and with a rise of tide of only 3 feet, was floated by being hauled a thousand feet; the schooner having no propeller or winches or steam pump, was without the means of helping herself or of aiding the salvors to get her off; the *Elfrida*, with the aid only of three of the salvors' anchors, hauled herself off with her own power. The schooner was without adequate pumps; the *Elfrida* not only was well supplied with pumps, but had a double bottom and tanks extending from stem to stern. The schooner was imbedded from two and a half to three feet in the sand; the steamer, with her water ballast pumped out, probably about six inches, if not wholly free at the stern. The schooner was exposed to the storms of the Atlantic coast, in imminent peril from any wind from the northeast to southeast; the steamer was protected by the jetty from any wind more northerly than southeast, and was lying on a far less dangerous coast. On the one hand, the amount awarded was found to have been a moderate compensation for the service performed; there is no contention in the present case that the amount awarded was moderate or reasonable, apart from the contract. That the percentage of the recovery is substantially the same in both cases is unimportant, for the reason that in all

cases where percentages have been considered in salvage awards the rate has always been diminished as the values saved have increased in amount.

Cases might readily be cited to the Court where compensation in the amount awarded in the *Agnes I. Grace* has been awarded for salvage services, irrespective of contract, but the learning and zeal of the learned counsel for the appellees will not be able to cite any case to the Court where $22,000, or a half of it, has been awarded as salvage compensation for a service similar in its essential elements to the case now in hand.

We conclude, therefore, that the *Agnes I. Grace* does not preclude an argument that the Court should disregard the contract in the present case, and we proceed to consider some of the authorities bearing on the right and discretion of the Court to do so, and to award a salvage compensation instead.

General Doctrine.

The practice of setting aside agreements for salvage services, upon the ground of excess, extends very far back in the history of law.

In *The Roll of Oleron*, Art. 4 (2 Black Book of the Admiralty, Twiss, p. 437), a compilation of maritime judgments made near the end of the twelfth century, the rule is laid down :

"And yf it were so, that the mayster and the marchauntes have promised to folke, that shuld helpe them to save the shyp and the said goodes, the thyrde parte or half of the said goodes which shuld be saved for the peryll that they be in, the justyce of the country ought well to regarde what payne and what labour they have done in saving them, and after that payne, notwithstanding that promise which the said mayster and the marchauntes shall have made, rewarde them. This is the judgment."

In 2 *Parsons Shipping & Admiralty*, *p.* 306, the rule is stated:

"If at the time of the service, the salvors make a bargain with the owners of the property in peril, or their servants, as to the amount of salvage, this is *enforced by the*

Court only so far as it seems equitable and conformable to the merits of the case, and it is wholly disregarded, if it be deemed unconscionable and oppressive to the owners of the property saved, or entered into under circumstances which amount to compulsion."

In *Jones on Salvage* (pp. 97, 98), it is said:

"The Court will also refuse to recognize an agreement where the master improperly or recklessly contracts to pay the salvors an exorbitant amount. In the *Theodore*, Swabey, 351, the salvors induced the master of a vessel which had parted from her first anchor and was driving, with another anchor down, but was otherwise in no danger, to enter into an agreement to pay them £200 for bringing the vessel into port, which they did after a service of about four hours; the Court held the agreement to be an exorbitant one, and pronounced against the agreement and for the sufficiency of a tender of £50 by the owners. * * * If, on the other hand, the agreement should be unjust or inequitable towards the salvors, the Court will refuse to recognize it. And where the owners of a vessel to which valuable services have been rendered whilst she was in a position of considerable danger alleged that the salvors agreed to do the work for eight shillings six pence, the Court regarding this amount as futile, gave the salvors £10 and costs. In *The Phantom*, L. R., 1 Adm., 58, Dr. LUSHINGTON, p. 61, said: 'However much it has been agreed upon by both parties, the Court is in the habit of overruling such an agreement, if it is unjust and inequitable' (The *Kingalock*, 1 Spinks, 263)."

These passages from Parsons and from Jones are cited with approval by the Supreme Court of the United States in The *Tornado*, 108 U. S., 110.

In *Marvin on Wreck and Salvage, Sec.* 119, it is said:

"It is also competent for the parties interested to agree upon a stipulated sum, as a salvage reward, for the rendition of salvage services, to be paid only in the event that such services save, or contribute to save, the property. Such an agreement does not alter the nature of the service as a salvage service; but only fixes the rule by which the Court is to be governed in awarding the compensation (Schooner *Emulous*, 1 Sum., 207; *Bearse* v. *Pigs of Copper*, 1 Story, 323; *Otis* v. Brig *Whitaker*, 18 Law Reporter, 496).

It is within the authority of a master of a vessel in distress to enter into such an agreement; and, also, within the authority of the master of a salving vessel to bind his owners and crew by such agreement (The *True Blue*, 2 W. Rob., 179). When such agreement is fairly made and fully understood by the salvors, and the condition of the ship is fully disclosed to them or known by them, it will bind them and become the measure of their compensation; notwithstanding a change of circumstances may increase the labor and difficulty of performance beyond what was originally contemplated by them. But if the condition of the ship was unknown to them, or not disclosed to them, the agreement will not bind them (The *Kingalock*, 26 Eng. L. & Eq., 596; The *True Blue*, 2 W. Rob., 180; The *Graces*, Id., 294; The *Henry*, 15 Jurist, 183; 2 Eng. L. & Eq., 564; The *Resultatet*, 22 Eng. L. & Eq., 620; The *Firefly*, 29 Law Times, 147). And *such agreement will not be binding upon the master, or owner of the property, unless the Court can clearly see that no advantage has been taken of the party's situation, and that the rate of compensation agreed upon is just and reasonable.* 'This doctrine is founded upon principles of sound policy, as well as upon just views of moral obligation. No system of jurisprudence founded upon moral or religious, or even rational principles, could tolerate for a moment the doctrine, that a salvor might avail himself of the calamities of others to force upon them a contract unjust, oppressive and exorbitant; that he might turn the price of safety into the price of ruin; that he might turn an act, demanded by Christian and public duty, into a traffic of profit, which would outrage human feelings and disgrace human justice' (The Schooner *Emulous*, 1 Sum., 207; *Laws of Oleron*, Art. 4)."

KENNEDY'S *Law of Civil Salvage*, p. 208, states the rule:

"It is not, however, it is submitted, only where it is proved that there has been unfair dealing in the shape either of fraud or misrepresentation, or practical compulsion, that the Court will interfere with an agreement which fixes a grossly excessive remuneration. Evidence of any such unfair dealing, greatly strengthens, of course, the case against the agreement, but even without such evidence, if it finds the exorbitancy to exist, however that exorbitancy originated, the Court will, alike on principle and on authority, be justified in setting aside the agreement.

The propriety of disregarding an agreement, if the amount of the award appears to the Court to be inequit-

able, has, indeed, been recognized by the maritime law from very early times."

KENNEDY, at page 208, further says:

"The duty of an admiralty court to set aside a salvage agreement for an excessive reward, where the salvor has been able practically to dictate his own terms, has been nowhere more powerfully stated than by Story, *J.*, in The EMULOUS (1 Sumn., 207, at pp. 210-211):

"'No system of jurisprudence purporting to be founded upon moral or religious, or even rational, principles, could tolerate for a moment the doctrine that a salvor might avail himself of the calamities of others to force upon them a contract unjust, oppressive, and exorbitant; that he might turn the price of safety into the price of ruin; that he might turn an act, demanded by Christian and public duty, into a traffic of profit, which would outrage human feelings and disgrace human justice.'"

In *Wendt's Maritime Legislation* (*3d Ed.*), *London*, 1888 (*p.* 751), the rule of the *German Commercial Code*, as stated in Article 743, is translated as follows:

"Art. 743. When during the danger an agreement has been made as to the amount of the salvage or payment for assistance, such agreement may nevertheless be disputed on the plea that the amount agreed upon was excessive, and the reduction of the same to an amount more in accordance with the circumstances of the case may be demanded."

The *Ellen Holgate*, 8 Leg. Gaz., p. 44; 8 Federal Cases, p. 509:

Here the contract was sustained as reasonable. Judge BRADFORD said (p. 510):

"As this was especially a salvage service, there must be a reward measured by the rules that apply to salvage cases, and *no contract can be permitted to stand which would compensate the salvors to a great degree more than they would be entitled to for a salvage service were there no contract;* but when it does appear that the contract was entered into fairly without any compulsion or taking undue advantage to make an unconscionable bargain, and in point of fact, in the judgment of the Court, the *price agreed to be paid did not much vary in amount from what*

the libelants would have been entitled to for a salvage reward, then in our judgment the contract should not be disturbed."

A steamer broke her shaft off the coast of England, and was towed by the *Coomassie* to Falmouth; the master of the *Coomassie* insisted on a contract for £6,000, which was signed. The towage lasted 3 days, and was for a distance of about 430 miles. The Court awarded £3,000 salvage, and in the course of its opinion (p. 178), said:

"It has been laid down that the sort of pressure requisite to invalidate an agreement of this nature, and made in such circumstances, is less than the duress required at common law to invalidate an agreement, and the question is: What amount of duress will have that effect? Again, the effect of the decided cases is to show that the agreement insisted upon by the salvors at the time must be inequitable; and then comes the question: What is an inequitable agreement in cases of this sort? On this point, two ingredients are commonly referred to. First, the parties contracting must be shown not to have contracted on equal terms. I am inclined to think that, in general, in the case of salvage services contracted for and about to be performed, the parties are on unequal terms, and, therefore, the mere fact of their standing in such a position will not invalidate the agreement. If, however, contracting on unequal terms—that is to say, the master of the salved ship being at a disadvantage—it further appears that the sum insisted upon is exorbitant, then the two ingredients exist which will induce the Court not to uphold the agreement. Now, I have no doubt that the parties stood, as they usually do in such cases, upon unequal terms. The question that follows is: Is £6,000 a wholly unreasonable, or, in other words, an exorbitant sum? I think it is, and, therefore, it seems to me that the two things necessary to invalidate the agreement exist here. That being so, and that being a matter entirely for me, the next question is: What amount should the salvors receive? That depends on the usual considerations applicable to cases of this sort."

The *Rialto*, 1891, Prob. Div., 175.

In *Post* v. *Jones*, 19 How., 150, the whaling ship *Richmond*, being wrecked on the rocks of Behring Straits, was sold by her master with her cargo of oil and whalebone to

satisfy agreements for salvage made by him with the masters of two other vessels.

The Court said:

"It has been contended, also, that the sale was justifiable and valid, because it was better for the interests of all concerned to accept what was offered than suffer a total loss. But this argument proves too much, as it would justify every sale to a salvor. Courts of admiralty will enforce contracts made for salvage service and salvage compensation, where the salvor has not taken advantage of his power to make an *unreasonable* bargain; but they will not tolerate the doctrine that a salvor can take the advantage of his situation, and avail himself of the calamities of others to drive a bargain; nor will they permit the performance of a public duty to be turned into a traffic of profit (see 1 Sumn., 210). The general interests of commerce will be much better promoted by requiring the salvor to trust for compensation to the liberal recompense usually awarded by courts for such services. We are of opinion, therefore, that the claimants have not obtained a valid title to the property in dispute, but must be treated as salvors."

The Court set aside the contract and allowed the salvors one-half the property saved (the cargo) and allowed them freight on the other half from the first port of safety in the Pacific Ocean to Sag Harbor, Long Island.

The steamer *Adirondack*, of 1502 tons register, bound from New York to Liverpool, with a cargo of cotton, grain and salt beef, and valued, with her cargo, at $300,000, broke her low pressure piston, thus entirely disabling her machinery for the time being. It would have been practicable, in two or three days, with the appliances on board, to get the ship under steam with the use of the remaining engine. While in latitude 59° 44″ west, about 450 miles off Halifax, the nearest port, and 662 miles from New York, she was taken in tow by the steamer *Plainmeller*, under a written agreement to pay £4,000 for towage to New York. This agreement was made only after the captain of the *Adirondack* had attempted unsuccessfully to obtain a lower price. It was held that the contract was unjust and made by parties not upon equal

terms; that it should be set aside and a decree entered for $7,500, the amount of a tender deposited in Court by the claimant.

CHOATE, *J.*, said:

"Upon these facts, I think there can be no question that the sum demanded by the captain of the *Plainmeller*, and finally assented to by the captain of the *Adirondack* (£4,000), was very largely *in excess of that liberal compensation which courts of admiralty award for* SIMILAR SERVICES, and that the amount tendered, which is a little more than £1,500, is fully up to the measure of salvage award which any court of admiralty would give for the service rendered.

"The *Adirondack* was in no present peril. She was temporarily disabled in her machinery, but unless overtaken by very tempestuous weather, her machinery could have been soon repaired so that she could proceed on her voyage. Her cargo was not perishable. There is no proof that the broken machinery endangered the safety of the ship. She was otherwise sound and able to keep the sea for an indefinite time. The place where she was was the open ocean, with no risk of going ashore. She had no passengers * * * In respect to the special contract for £4,000 in this case, it must be held that it was unjust and unreasonable in amount. *While there is no charge of fraudulent practice by which the agreement upon this sum was procured, there is evidence enough that the agreement was improvident and entered into without much consideration of the proper elements of a salvage award.*

"The contract recites that the *Adirondack* was totally disabled as to her machinery. This was true as to her temporary disability, but misleading as a statement of absolute disability. The captain of the *Plainmeller* insisted on his own terms and made the agreement to them a condition of rendering any assistance. I think he took advantage of the situation of Captain Robert to exact from his circumstances of present distress an exorbitant and grossly excessive amount. *The master of the Adirondack was inexperienced. This was his first voyage as master.* He knew little or nothing of machinery, and seems not entirely to have relied on what his engineer told him as to their ability to repair and go on under steam. His judgment was overborne by the pressure of the circumstances in which he was placed, to that degree which fully *justifies a court of admiralty in relieving the owners of his ship from the inequitable bargain into which he improvidently entered.*"

Brooks v. The *Adirondack*, 2 Fed. Rep., 387.

The steamer *Sirius*, valued with cargo and freight at $143,539, at anchor in a disabled condition, near an island off Lower California, in a situation which would be dangerous if a storm arose, was towed 320 miles to port, under a contract for $20,000.

The master of the *Tillamook* was willing, in the alternative, to furnish stores and gratuitously take an officer to San Diego to procure assistance, but the master of the *Sirius* was unwilling to take the risk of a storm arising in the meantime.

Action was brought upon the contract, but the Court of Appeals for the Ninth Circuit set it aside and entered a decree for $8,000, saying:

"In our view of the facts, therefore, the master of the *Tillamook* took an unfair advantage of his power and made an inequitable bargain not conformable to the merits of the case, and the towage contract should not be enforced."

The *Sirius*, 57 Fed. Rep., 851 (U. S. Circuit Court of Appeals, Ninth Circuit),
Reversing the *Sirius*, 53 Fed. R., 611.

In the *Cargo ex Woosung*, 1 P. D., 260, BAGALLAY, *J.*, said "the ground of exorbitancy of the agreement would be sufficient to set it aside."

In The *Kingalock*, *Spink's Reports*, 263, 265, a brig, disabled at sea, made a contract for towage to London, for £40. During the service, the master of the tug discovered that the brig had been very seriously damaged, which fact had not been transmitted to him. It was held that the mere concealment of a fact which might operate on the service, and therefore on the agreement, vitiates it. The agreement was set aside, and increased compention was awarded to the salvor.

The Court said (p. 265):

"An agreement to bind two parties must be made with a full knowledge of all the facts necessary to be known by both parties; and if any fact which, if known, could have any operation on the agreement about to be entered into is kept back, or not disclosed to either of the contracting parties, that would vitiate the agreement itself. It is not necessary, in order to vitiate an agreement, that there

should be moral fraud; it is not necessary, in order to make it not binding, that one of the parties should keep back any fact or circumstance of importance, if there should be misapprehension, accidentally or by carelessness; we all know that there may be what, in the eye of the law, is termed equitable fraud. * * * I therefore come to the conclusion that, as it might affect the performance of the service, the agreement was null and void *ab initio*."

CASES OF VESSELS STRANDED, OR AT PIERS, OR LYING AT ANCHOR.

It was argued before the District Judge that cases of vessels, which were stranded in a position where communication with the shore and salvage facilities were available, stood on a different basis from those where the contracts were made at sea, and that, accordingly, the statements of the Judges that parties contracting for salvage, *prima facie*, do not stand upon an equal footing, have no application to cases of this class.

We, therefore, bring under a separate head the cases decided with reference to vessels stranded or lying at anchor with communication to the shore, or while lying at piers in port, which we submit show that the rule is not different as applied to such cases.

In the *Tornado*, 109 U. S., 110, where a contract had been made in the City of New Orleans by the master of a vessel in distress, to pay certain tug boats $50 per hour for pumping services until the vessel should be discharged, and a suit was subsequently brought against the vessel and cargo for this amount, when it was found that the water had all been pumped out of the ship twelve days before the discharge was finished, the Court held that the contract was not binding upon the property sought to be charged and set it aside as inequitable. Mr. Justice BLATCHFORD said:

"Every agreement for salvage compensation 'is subject as to amount' to the judgment of the Court as to its being equitable and conformable to the merits of the case. 2 *Parsons on Shipping*, 306; the *Helen and George*, Swabey, 386; *Jones on Salvage*, 94, *et seq.*"

It is worthy of remark that the Court did not limit the application of this rule that every agreement for salvage compensation is subject as to amount to the judgment of the Court as to its being equitable and conformable to the merits of the case to instances where the contract is made at sea, but on the contrary, expressly applied it to a case where the contract was made in a port, where any quantity of similar assistance must have been immediately available.

The barge *Jenny Lind*, worth with her cargo $25,000, was aground on a bar in the Mississippi in such a position as to be in some danger of breaking in two. Her captain made a written contract to pay the salvors 50 per cent. of the value of the property saved. In an action for salvage, the contract was set aside and a decree rendered for one-sixth. The Court said, per McCaleb, *J.*:

"Such contracts as the one which he [the captain] *thought proper to execute in favor* of the libelant [Williams] will be recognized no further in a court of admiralty charged with a case of salvage than they accord with its own equitable discretion in filling the *quantum* of compensation."

The *Jenny Lind*, 1 Newberry's Adm. Rep., 443.

A ship valued at $25,000, laden with a cargo of sugar worth $50,000, and drawing 14½ feet of water, went aground upon a rocky ridge, extending obliquely under her from the starboard quarter nearly to the port bow, upon which there were but 12 feet of water. Under a written contract, which was attached to the libel, by which the master, being unable to obtain a better offer, agreed to pay $10,000 for getting his vessel afloat, she was hauled off after 20 hours' work by means of a partial discharge into schooners and by heaving upon a large hawser made fast to an anchor. The contract was set aside and an award made of $7,875. Locke, *J.*, said:

"The contract which was made between the master and the salvors can have no binding force upon the owners, *as although probably no especial force or influence was brought to bear upon the master, yet the position*

in which the property in his charge was placed and the necessity of immediate action compelling the contract, is recognized in admiralty law. It certainly cannot be said that no advantage was taken of the master on account of the position in which his vessel was placed, as that position was the very foundation of the contract. It was not a voluntary contract on his part. * * * If, from any mistaken idea in regard to the delays and expenses of the Court, he desired to make a bargain rather than to submit to a judicial decision, he was, nevertheless, from the surrounding circumstances, forced to make one that his unbiased judgment would not have approved, had it not been for the position in which he was placed. It was out of his power to obtain assistance in any other way. There were no competing bidders for work, and he was compelled to make the best bargain he could, no matter how inequitable it might be."

The *Tennasserim*, 47 Fed. Rep., 119 (District of Fla.).

The Court thereupon awarded $7,875, together with costs, charges and expenses to be taxed.

See also

The *Don Carlos*, 47 Fed. Rep., 746.

In The *Sophia Hanson*, 16 Fed. Rep., 144.

BENEDICT, *J.*, said:

"If this action was based upon a contract made between the master of the schooner that grounded on the West Bank in the Lower Bay of New York harbor, and the tug that pulled her off, as a contract for towage, the libelant could not recover for the reason that the Court would not enforce an agreement to pay $1,000 for a few hours of ordinary towage service, such an agreement being clearly unconscionable. But the action is not based upon contract. The claim rests upon a salvage service performed. *In such an action the agreement of the master to pay* $1,000 *for the service is by no means conclusive on the question of the amount of salvage to be awarded* * * * That service consisted simply in pulling the schooner off the West Bank where she had grounded on an ebb tide, having missed stays * * * I consider $500 to be a liberal salvage compensation."

Where an agreement was made between the captain of a steamer and the owner of a stranded vessel that the

former should render such salvage services as might be necessary at the rate of $450 per day, the Circuit Court refused to disturb a salvage award of the District Court equal to the stipulated amount, NELSON, *J.*, saying:

"That contract was not necessarily binding upon the vessel in peril, or upon her owner, and it would have been the duty of the Court to have disregarded it altogether, and to have awarded a rate of compensation according to the principles of admiralty in salvage cases, if any advantage had been taken by the libelant in fixing the rate in the agreement. The rate thus fixed is looked at in determining the amount proper to be awarded for the salvage service; but would be disregarded, *if disproportionate and unreasonable*, OR *if extorted through the pressure of impending calamity.*"

The *A. D. Patchin*, 1 Blatchford, 414.

A canal-boat, loaded with coal, sank in the Kill Von Kull, and the master made a written contract with the libelant to award him 60 per cent. of the value of the cargo (which would amount to some $900) for his services in raising it.

In an action setting up the contract, and praying for such salvage award as might be just, the contract was disregarded and $250 awarded.

BENEDICT, *J.*, said:

"Agreements to pay for salvage services, made by masters of canal-boats, when with easy reach of all parties interested in the property to be saved, are subject to be closely scrutinized, and will not be upheld in a court of admiralty when it appears that the price agreed on by the master is unreasonable or exorbitant.

202 *Tons of Coal*, 7 Benedict, 343.

A schooner lying at a pier on the other side of which a vessel was burning was hauled out into the stream by a tug, under an agreement by the mate in charge to pay $500. The libel was based upon the contract.

BENEDICT, *J.* (p. 180), said:

"The contract upon which the libelant relies was entered into when the vessel was actually in no great peril, for the weight of the evidence is that steam fire engines were upon the dock, which proved able to prevent the

dock shed from catching fire, and which were able to have preserved the schooner, even if the shed had caught fire. There was, nevertheless, apparent peril, sufficient to affect the judgment of the mate in charge and to justify a desire to move the schooner. * * * For such a service, the demand of $500 appears to me exorbitant. The circumstances did not justify the making of such a demand, nor the acquiescence in it by the mate. The amount should be reduced to $100."

The *Jacob E. Ridgway*, 8 Benedict, 179.

A tug, having a brig in tow to bring into the harbor of New York, carelessly ran her aground on the Romer Shoal off Sandy Hook and was unable to pull her off, but on the next morning, another tug coming to the spot, the master of the brig made an agreement to be towed off for $2,500, and the two tugs got the brig off. *Held*, upon a libel for salvage, that the agreement was exorbitant, and that the $1,250 was a sufficient compensation for the service, of which sum the second tug was entitled to one-half, but the other tug, having been the cause of the disaster, would not be allowed to get anything.

The *Homely*, 8 Benedict, 495.

A libel was filed for a salvage service, which consisted in towing a ship from the neighborhood of a fire, where she was in apparent, though not in real danger, under a contract to pay $1,000 for the services. It was held that the contract could not be enforced, and $300 was awarded. NIXON, *J.*, said:

"Contracts of this nature, entered into in the midst of excitement, are justly regarded by the Courts with suspicion, especially when they are of such an unconscionable character. Neither the *Waite* nor the *Young America* was subjected to any peril which authorized the demand for or the agreement to pay any such sum for a service without risk, and of such short duration."

The *Young America*, 20 Fed. Rep., 926.

The case of the *R. D. Bibber*, 33 Fed. Rep., 55, decided on appeal in the Circuit Court, for this Circuit, in 1887, is not in point for the appellees. The Court in that case expressly found that the fifty per cent. stipulated in the

contract for the salvage of a vessel laden with railroad iron, where the vessel had been abandoned, was not in excess of the usual cost of salvage of a vessel with such a cargo on that coast, and that the amount was reasonable, and "does not exceed to any great extent the actual cost for work and labor to salve wrecked railroad iron." It was also found that the vessel and cargo were saved at the risk of serious damage to the property engaged in the work of salvage, one of the lighters being injured, and the crew suffering much hardship. The service was principally lighterage service.

PARDEE, Circuit Judge, distinguishing the case of the *Hesper*, 18 Fed. Rep., 672, said:

"The *Hesper* was a steamship aground in fair weather, under the control of her master and crew, who did not abandon her to salvors, and the services rendered her were at the procurement of her agents. The salvage of the *Hesper* was due as much to her machinery and her master and crew as to the services of the lighters and tugs called to her aid."

BURDEN OF PROOF AS TO AGREEMENTS.

In NEWSON on the *Law of Salvage* (p. 52) the rule as to the burden of proof is stated as follows:

"The burden of proof is on the parties alleging the salvage agreement. They must show, first, that the agreement was made, and, secondly, that it is fair and equitable. After the agreement is established, the burden will shift onto the parties disputing its validity."

In The *British Empire*, 6 Jurist, 608, the Court stated that the burden of proving the justice, as well as the fact of an agreement, is upon those who set it up.

In The *Arthur*, 6 Law Times, N. S., 556, Dr. LUSHINGTON said:

"Most clearly the onus in cases of this description lies on those who set up the agreement, and they are bound to prove the agreement was made after consideration, and was fair and equitable."

SUMMARY.

The foregoing review of the authorities suggests that the owner of property sought to be bound by an excessive salvage agreement, need not show such fraud or duress as would vitiate a contract at law, in order to have the agreement set aside in admiralty.

If circumstances are found which tend to show that a master in distress has been overreached or misled, the case becomes more simple; but where the Court clearly sees that the amount contracted to be paid is greatly in excess of what a court of admiralty would have awarded, apart from contract, it considers the inexperience of the master, his limited business capacity, his want of acquaintance with other facilities, the distress of his situation, a mistaken judgment on his part as to present or probable future peril of the property, or the improvidence of the bargain as evidence that the parties to the contract were not treating on terms of ~~equity~~ equality. Upon a finding of clear excess coupled with any one of the other elements, it will generally set the contract aside at the request of the owner, whose property is sought to be charged.

The principle which underlies these decisions is, that in any disposition which a court of admiralty may make of a case, the salvor will receive an ample and liberal compensation. The question is not, as at law, whether the recovery shall be for the contract sum or nothing; but whether it shall be for the contract sum or such sum as the Court may think fit and proper, irrespective of contract. The courts are less reluctant to disregard the contract and to award a salvage compensation, because that of itself is greatly in excess of mere payment for work, labor or material and for services actually performed. Every ordinary salvage award carries with it a bounty for the encouragement of salvors, and to stimulate their efforts to the performance of similar services in the future. To offer a salvage compensation, therefore, is not to make a niggardly offer of a diminished reward, but is to tender full payment, with a liberal bounty in addition.

REASONS FOR SETTING THE CONTRACT ASIDE.

1. *The amount stipulated for in the contract and recovered in the final decree was excessive and unreasonable as against the property charged.* Under Point I. cases have been cited and some argument adduced to show that a salvage compensation for the services actually performed would have probably amounted to about $5,000.

Without attempting to judge definitely the amount a court of admiralty would have given, it has appeared from the previous analysis of the services that the amount awarded under the contract was grossly in excess of just and full compensation, so much in excess that this Court would have reversed the decree and reduced the award, if any such sum had been given, irrespective of contract.

The *Depuy de Lome*, 13 U. S. App., 662.
The *Oxford*, 66 Fed., 590.
The *Phœnix*, 62 Fed., 487.
The *Bay of Naples*, 1 U. S. App., 47.

Courts of Appeal are loath to set aside salvage awards, which, to a large extent, rest in the discretion of the instance court. It is not an unfair inference from the authorities previously referred to that a court of admiralty should in any case set aside a contract for such unreasonableness and excess as would justify an appellate court in reducing an award.

It is argued for the appellees that in judging of the reasonableness or unreasonableness of the contract, knowledge acquired by the event must not be availed of, but that the transaction must be viewed from the position occupied by the parties when the agreement was made.

If that be the true test, it would be impossible in any case to say that a contract made at sea was unreasonable. It can never be known what weather will be met with or what accident may supervene.

It could never, of course, be known what difficulties might be met with in removing a vessel from a strand. As between the parties to the contract, such a test

might not be unfair, but it generally happens that one of the parties to it is not a party to a suit brought upon it. In a suit to charge the property of persons who were not parties to the agreement, and who might or might not have made it, had they been present, the Courts of this country, in the cases previously cited, have uniformly looked at the whole transaction in the light of the event, and have applied the test of reasonableness in that light.*

The true view to be taken of these agreements is not to view them strictly as contracts, but simply as evidence of what the award should be, to be considered in connection with other evidence, by which, if it be for an exorbitant amount, it may be overborne.

The *Agnes I. Grace*, 49 Fed., 662, 664.

The appellees claim also that the excess in the contract over and above what the Court would have allowed, is only a fair compensation for the risks they took under it, which an ordinary salvor would not take.

What are those risks? A careful examination of the contract discloses but one, namely, that they might have failed to accomplish the work in 21 days, and if they did, the master might then have awarded the contract to another contractor and thus deprived the salvors of getting back their outlay.

Taking the weather probabilities in connection with the actual situation of the vessel at the time, this risk was very trifling. Clarke certainly considered it trifling, or he never would have assented to such a term in his contract. He probably considered it trifling for another and highly sufficient reason: that there was no other salvor available, who either would or could take his place in case he failed. Moreover, it must be noticed that, as against this term in his contract, there was nothing binding Clarke to continue his exertions for twenty-one days. If he had not succeeded in floating the ship on the 17th of October there was nothing in the contract to prevent him from taking up his anchors and going away, leaving the work and the ship, without the expenditure of an additional dollar. He was not obliged, under

* cf. Roll of Alerou, ante p 43.
Tornado, ante p 51.

the contract, to incur any heavy loss, and the chances of her immediate removal were so much greater than the chances of delay beyond twenty one days that the latter can hardly be put forward as a justification for awarding three or four times the amount of a salvage reward as a compensation for that single risk.

The risk of receiving no compensation in case of failure to salve the property is one incurred by all salvors in all cases. That risk is one of the things intended to be covered by the bounty given in every case which is attended with success.

Clarke under this contract therefore took the usual risks only with the single additional risk that there was a remote possibility, but no probability, that he would be deprived of all compensation if the ship was not floated in 21 days.

The salvors' lien is always limited to the ship, whether she come off sound or damaged, and the stipulation in the contract that he was to accept her damaged, at the election of the master, in lieu of the price agreed to be paid by the contract, was only the formulation of a general rule of law, applicable to all ordinary salvage cases.

It does not appear, therefore, that the slight risk assumed by the libelants in this case, additional to the ordinary risks assumed by salvors, can fairly be set over against the great excess in the final decree over the sum with which the appellant's property justly should be charged.

2. *The parties did not stand on a footing of equality in negotiating this agreement.*

As was well said by BUTT, *J.*, in The *Rialto* [1891], Probate, 175: "In general in the case of salvage services contracted for and about to be performed the parties are on unequal terms." On the one side, we have Captain Clarke, a seasoned veteran, who had been through many salvage experiences on that coast, was perfectly well acquainted with the dangers and chances of success, and who knew from an experience of many years and extended over many cases in which he had never failed to

float a ship (fols. 416, 410, 427, 430, 490), what the real probabilities of success were. On the other side, a young and inexperienced master, 28 years of age (fol. 913), seeing his first command (fol. 756) aground, being ignorant of the locality, and having no experience by which to judge of his present danger or that reasonably to be apprehended in the future (fols. 764, 774, 775, 819, 820); his agents, upon whom he was implicitly relying for counsel (fol. 772) advising him that Clarke should have sole charge of the matter, and that it would be inexpedient and more expensive to apply elsewhere for assistance (fols. 227, 239, 802, 826, 715, 719), who ~~were~~ was sending panicy cables to his owners, based upon representations made to him by Clark that sand was banking, or was likely to bank around his ship, when, in point of fact, it was not banking, and would not around her as she then lay, but only in front of her, and between her and the shore (Hutchins, fol. 392; Coveny, fol. 388); whose judgment was, to some extent, paralyzed by his great anxiety to see the ship afloat (fol. 936). The situation of his vessel, stranded upon a sparsely settled coast, three or four miles away from a town of one thousand inhabitants, which offered no other assistance than Brock, who had no plant, was such that he did not feel justified in leaving her to inquire himself at Galveston for other assistance or relief. It is true there was cable communication between Velasco and Europe, but that ought not to inure to the advantage of respondents, if through mistake or misapprehension, or even neglect, the shipowners, 4,500 miles away, relied upon the fairness and fidelity of their agents and of the salvors.

The sum of the evidence is that there was no other assistance available to the master except that of Brock and Clarke; that Brock alone had not a sufficient plant to perform the service; that Clarke alone, in the whole region of Galveston and Velasco, had the necessary available plant (fols. 490, 512, 527) for hauling the ship off; that, although Clarke had originally offered to perform the service for what a court of admiralty would allow, which offer the master had mistakenly declined, without communicating it to his owners, and which they would have authorized had they

known of it, he afterwards positively declined to render any assistance to the ship, except upon a contract to pay $22,000 for the services; and Brock gave him a similar refusal (fols. 795, 796, 797).

The Galveston Lighterage Company, a lighterage rather than a salvage corporation, was not specially fitted, so far as appears, for the performance of salvage services to a vessel in ballast, their anchors being light (fol. 428). Whether they were or not, is unimportant, as Mr. Moller, the ship's agent, appears to have asked them if they would send tugs and appliances to Velasco to assist the ship, and, after consideration, they answered, No (fols. 489, 490).

In these circumstances, while possibly there were other alternatives, practically there are none. The master was in distress, and practically in duress. As far as he saw, the alternatives presented were to accept Clarke's terms or to leave the vessel indefinitely upon the beach.

3. *The shipowners are not estopped, by their qualified authority to the master, from asking the Court for relief.*

The cable of October 12th (fol. 570) to accept £4,580, if lower impossible, was sent by them upon a misapprehension of the vessel's position and danger, due to the master having communicated to them only partial accounts of the vessel's position on the beach, and having sent them two messages on the 11th regarding his fears of sandbanking, which were not justified by any indications then present, nor by the reasonable probabilities.

At the time these cables were received, the owners had no information of the vessel's position, except such as was contained in four messages from the master (fols. 568, 571) and one from Moller (fol. 628).

The master had not informed them that the libelants were willing at an early stage of the case, to get the *Elfrida* off the beach for a sum which an American admiralty court would allow. If they had known of this offer, they would have accepted such a mode of settlement (fols. 572, 573). They authorized the acceptance of the tender under the supposition that the services would not

be performed under any other agreement than for a specific amount (fol. 590).

They had not been informed of the vessel's draught, the depth of water she was lying in, how much greater her draught would have been with the water ballast pumped out than the depth of water under her, nor did they know anything as to the claim of sand-banking, except such as was contained in the master's telegrams (fols. 573, 574). They state unqualifiedly that if they had known that she was lying easily on a sandy bottom, head on the beach, with hardly any perceptible accumulation of sand around her, in water less than a foot shallower at one end of her than her draught would have been with her water ballast tank empty (a fact admitted in the amended libel, fol. 54), and that the weather was fine, with no immediate prospect of change, which is also admitted, they certainly would never have authorized the agreement for such a large sum (fols. 574, 581, 582). Had the master informed them of these facts, they would have appointed an agent to investigate and report (fols. 576, 577).

They admit that it was the master's duty to advise them of these matters, but add that the master did not even mention the circumstances in any of his letters (fol. 590).

The libelants have not been prejudiced in any way by the master's failure to inform his owners fully of the vessel's position before pressing them, as he did, for an acceptance of the tender. They will be amply compensated whichever way the case goes, while the owners of the property would be seriously prejudiced by having to turn over to the salvors, for not a great service, almost one-third of the gross value of their ship.

4. *There is circumstantial evidence of collusion between competing salvors.*

It has fairly appeared from libelant's evidence that the only available salvors were the libelants and Brock (fols. 490, 512, 416, 410, 427, 430, 918, 920), although Brock, it appears, had not the requisite anchors (fol. 470).

The Galveston Lighterage Company, the only other pos-

sible salvor, appears to have been otherwise engaged (fol. 490).

When the ship first grounded, Brock began to assist her, and continued to do so two or three days (p. 79), then Clark appeared upon the scene and saw the captain, who, thereupon, determined to ask for tenders. Moller, the ship's agent, evidently a friend of Clarke, had communicated with Morrissey, his agent in Velasco, who advised the captain of it, recommending that Clarke attend to the matter exclusively (fol. 237, 239). Brock on learning of this, had been telegraphing to Moller, Lloyd's agent, and to another underwriter's agent in Galveston, asking why he was shut out, and why he should not be let in (p. 240). As soon as Clarke came to Velasco, Brock appears to have ceased his efforts to obtain a contract, or to do anything for the vessel. When the tenders were received, Brock's was found to be $24,000 and Clarke's $22,000. Before the master saw Clarke, both Clarke and Brock had learned of his qualified authority to accept $22,000, if lower was impossible (fol. 799), and thereupon both refused to do any work upon the vessel for less than $22,000, and Clarke threatened to charge more, if terms were not promptly agreed to (795, 796, 797).

A very significant fact bearing upon the subject of collusion appears in the evidence. After the tenders were received, it appears that the master informed Brock of Clarke's tender and asked him if he would accept less, and that Brock refused to do so (fol. 795).

It is inconceivable that Brock, who was so eager for the work at first, should have refused to discount Clarke's bid by $500 or $1,000, unless he was already committed to Clarke.

It appeared that Brock and Clarke were both engaged on the work, and that the plant of both was used. Clarke did not state the terms on which Brock participated in performing the salvage service, although collusion between him and Brock was distinctly charged in the libel and denied in the answer.

After the vessel was floated, Brock telegraphed Clarke:

"Captain comes to Galveston, train to-morrow, *get papers, seize ship*."

Clarke practically admitted, when confronted with this telegram, that Brock had an interest in the transaction (fol. 548).

On the next day, Brock advises Clarke by telegram: "Ship seized" (fol. 739).

Moller took the stand and denied any collusion with his friend Clarke. Yet it appears that Clarke had telegraphed Moller to have Wilson, Moller's father-in-law (fol. 524), "get papers ready seize *Elfrida*" (fol. 736); and that when the libelants proceeded to examine Captain Burgess of the *Elfrida* in their own behalf, Mr. Wilson, acting as counsel, Mr. Clarke interrupted the proceedings by the statement that he had never employed Wilson to represent him (fols. 925, 125, 126); whereupon the United States Commissioner, who was taking the testimony, declared in open court that Mr. Wilson had been employed by Moller (fol. 826).

Moller also admitted that he detained the vessel at Velasco after she was free, in order to give Clarke an opportunity to seize her, and telegraphed Morrissey to that effect (fols. 522, 523), and admitted that he had promised Clarke that he would not let the ship go until he (Clarke) had got her seized (fol. 523). In other words, the agent of the ship, whose duty it was to advise and assist her, subordinated his duties to the interest of his friend.

These circumstances may fall short of absolute proof of collusion, but we submit that they at least afford some evidence of it, and have weight enough, when taken in connection with the other circumstances of the case, to justify the Court in setting the contract aside.

Last Point.

The decree of the District Court should be reversed, with costs, and a reasonable award should be made to the libelants on the basis of *quantum meruit*.

New York, April 17, 1896.

CONVERS & KIRLIN,
WILLIAM B. LOCKHART,
Proctors for Claimants, Appellants.

J. PARKER KIRLIN,
Advocate.

Supreme Court of the United States.

OCTOBER 10, 1896.

The Steamship "ELFRIDA,"
PYMAN, BELL & CO.,
Claimants-Appellants,

AGAINST

CHARLES CLARKE and ROBERT P. CLARKE,
Libelants-Appellees.*

BRIEF FOR THE "ELFRIDA," OPPOSING APPLICATION FOR CERTIORARI.

This was a cause of salvage instituted by the appellees, Clarke & Co. against the steamship *Elfrida*, in the District Court for the Eastern District of Texas, and there tried in October, 1895. The libelants obtained a decree for $22,000, with interest and costs. The claimants appealed to the Circuit Court of Appeals for the Fifth Circuit. The appeal was argued about the middle of April, 1896, before PARDEE and MCCORMICK, Circuit Judges, and SPEER, District Judge. On November 17, 1896, the Court of Appeals announced its decision, reversing the decree of the District Court and awarding to the libelants the sum of $10,000. Judge PARDEE dissented from the decision, and his dissent forms the chief ground for this application (Petition, p. 11).

* This is the title of the cause in the Circuit Court of Appeals.

The services were undertaken pursuant to a written agreement drawn up by the salvors (Rec., fols. 158, 215-216, 268, 269), and signed by Captain Burgess, of the *Elfrida*. The majority of the Circuit Court of Appeals were satisfied upon all the facts that this agreement called for a highly excessive and unreasonable compensation for the libelants' services, and that in negotiating it the parties did not stand upon an equality. Judge PARDEE was of opinion that the agreement was not unreasonable. It will be perceived, upon perusal of the opinion of the Court and of the dissenting opinion, that both agree that the so called contract is not binding upon the Court as to the amount to be awarded for the services, if found to be unreasonable and excessive; they differ solely on the view taken of the facts.

POINTS.

I.

The Circuit Court of Appeals correctly decided that the agreement between the salvors and the master was not binding upon the Court as to the amount stipulated to be paid for the services, but that the agreement was subject, as to amount, to the judgment of the Court as to its being equitable and conformable to the merits of the case.

(1.) Such has long been the doctrine laid down in the decisions of this Court.

In The *North Carolina*, 15 Peters, 40, this Court disallowed salvage as awarded by agreed arbitrators, and refused all compensation to the salvors for misconduct in attempting to obtain an undue advantage over the owners of the property. Mr. Chief Justice TANEY said: "But in "all such cases" (of agreements by the master), "unless "the acts of the master are ratified by the owners, his "conduct will be carefully watched and scrutinized by "the Court, and his contracts will not be regarded as

"*binding upon the parties concerned*, unless they *appear* "*to have been bona fide, and such as a discreet owner*, "*placed in the like circumstances, would probably have* "*made.* If he settles the amount by agreement, *those* "*who claim under it must show* that the salvage al- "lowed was reasonable and just. If he refers it to "arbitrators, those who claim the benefit of the "award must show that the proceedings were fair "and the Referees worthy of the trust. But in this case "the conduct of the captain is without excuse. The "salvage demanded was exorbitant, the danger of the "*North Carolina* was by no means imminent when she "was discovered by the *Hyder Ally;* nor did the latter "incur any hazard in going to her relief. The weather "was moderate, and she floated in a few hours."

In *Post* v. *Jones* (19 Howard, 150), this Court set aside an agreement for salvage compensation made by the master as unreasonable and excessive, and awarded a just compensation upon salvage principles.

Mr. Justice GRIER, in delivering the opinion of the Court, said: "The certainty of a liberal salvage allowance for the property rescued will be ample compensation for the possible chance of greater profits, by refusing their assistance, in saving the neighbor's property. It has been contended, also, that the sale was justifiable and valid, because it was better for the interests of all concerned to accept what was offered than suffer a total loss. But this argument proves too much, as it would justify every sale to a salvor. Courts of admiralty will enforce contracts made for salvage service and salvage compensation, *where the salvor has not taken advantage of his power to make an unreasonable bargain;* but they will not tolerate the doctrine that a salvor can take the advantage of his situation, and avail himself of the calamities of others to drive a bargain; nor will they permit the performance of a public duty to be turned into a traffic of profit (see 1 Sumn., 210). *The general interests of commerce will be much better promoted by requiring the salvor to trust for compensation to the liberal recompense usually awarded by courts for such services.* We

are of opinion, therefore, that the claimants have not obtained a valid title to the property in dispute, but must be treated as salvors."

In The *Tornado*, 109 U. S., 110, this Court again declined to be bound by a salvage agreement made between the captain and salvors. The contract was set aside, at the instance of the owners of the property sought to be charged, and salvage compensation was awarded. Mr. Justice BLATCHFORD there said: "*Every agreement for "salvage compensation is subject as to amount to the "judgment of the Court as to its being equitable and con-"formable to the merits of the case* (*The Helen and "George*, Swaby, 386; *Jones on Salvage*, 94 *et seq.*)."

(2.) The most approved text books state the law upon the subject as contained in the foregoing opinions, and in the opinion of the Circuit Court of Appeals herein. Quotations from a number of the text books will be found in the appended brief used in the Court of Appeals, (pp. 43-47).

We may also quote the following passage from CONKLING'S *Admiralty*, 280: "Contracts of this nature, how-"ever, are not held obligatory by courts of admiralty "upon the owners of the property saved, *unless "it clearly appears* that no advantage was taken "of their situation, *and that the rate of compensation is "just and reasonable.* In that case the stipulated rate of "allowance will generally be adopted and enforced by the "Court as just and conscientious."

It is pointed out in the opinion of the Court that the jurisdiction of admiralty to set aside salvage agreements went back at least as far as the Roll of Oleron, in the twelfth century, while no similar jurisdiction was exercised by a court of equity until the reign of Henry VI., two and a half centuries later (1 *Spence's Eq. Jur.*, p. 624).

See also, 2 *Pollock & Maitland's History of English Law, before the Time of Edward I.*, p. 533; Story, Eq., Sec. 39, "*Early English Equity*," by Judge Holmes, 1 L. Q. Rev., 162.

(3.) The sound view laid down in many of the cases in the lower courts (see appended Brief, pp. 46 to 56), is admirably stated in the opinion of the District Judge in the case of The *Agnes I. Grace*, 2 U. S. App., 322, where it was said:

"It is true, as is insisted by the respondents' counsel, that a *contract of this character is not binding upon the Court*, and that in all cases of salvage it is *competent for the Court to adjudge and assess the amount of the recovery in accordance with the equities of the case*, and, if it should appear that a contract of this character was an inequitable one, the Court would, of course, disregard it. But, whenever a contract has been entered into after due deliberation by the parties, and has not been shown to be in any respect an inequitable one, it is exceedingly valuable *as evidence* to enable the Court to arrive at a just determination. *The Court regards this contract as evidence in that light, and not as a conclusive contract.*

Again, in one of the cases referred in the dissenting opinion of Judge PARDEE (The *Alert*, 56 Fed. Rep., 721, which, however, was a totally different case on the facts), BROWN, *J.*, stated the rule as follows:

"Where the subject of the contract is a salvage service, the Court under the law applicable to that special head of jurisdiction, *may inquire into all the circumstances of the salvage contract, including its reasonableness and fairness;* and in doing this it must take note of the fact of a mutual mistake, if that is proved to exist, and award only such compensation as justice and equity may permit. *The right and the duty of a Court of Admiralty to examine into the fairness and reasonableness of every salvage contract whenever its fairness is challenged have been repeatedly asserted by the Supreme Court; and such has been the uniform practice in this district as well as others.*"

In Judge PARDEE'S dissent no mention is made of the case of The *Jenny Lind* (Newberry, 443), decided by his distinguished predecessor in Louisiana, Judge MCCALEB. This was a stranding in the Mississippi River. An agreement had been made for the removal of the vessel and her cargo for a stated sum. Judge MCCALEB found that the amount was excessive and exorbitant, and setting the contract aside,

awarded a salvage compensation. In announcing the principles that guided his action, he said (p. 447):

"But while I am clear in the opinion that I have no power to refuse to exercise a jurisdiction, which has been so fully and unequivocally conferred, and while I am satisfied from the evidence that the services performed by the salvors in this case are of a highly meritorious character, I am yet constrained to differ very materially from the view taken by the captain of the *Hungarian* in his estimate of the value of those services. Such contracts as the one which he thought proper to execute, in favor of the libelant (Williams), will be recognized no further in a court of admiralty charged with a case of salvage, than they accord with its own equitable discretion in filing the *quantum* of compensation. It would be absurd to call upon this Court to enforce the specific performance of such contracts. They may, and often do, form a fair and equitable criterion in awarding compensation for salvage services, if those services have been rendered under circumstances which show that the parties have voluntarily, and without any controlling necessity, on the side of the proprietors of the property saved, or their agents, entered into a contract for a fixed compensation, or u on the ordinary terms of a compensation for labor and services *quantum meruerunt;* in either case it does not alter the nature of the service, but only fixes the rule by which the Court is to be governed in awarding the compensation. It is still a salvage contract and a salvage compensation. But contracts made for salvage services are not held obligatory by a court of admiralty upon the persons whose property is saved, unless the Court can clearly see that no advantage is taken of the situation of the parties, and that the rate of compensation is just and reasonable. The doctrine is founded upon principles of sound public policy, as well as upon just views of moral obligation. And it has been remarked with equal justice and elegance, that no system of jurisprudence, purporting to be founded upon moral or religious, or even rational principles, could tolerate for a moment the doctrine, that a salvor might avail himself of the calamities of others, to force upon them a contract, unjust, oppressive and exorbitant; that he might turn the price of safety to the price of ruin; that he might turn an act, demanded by Christian and public duty, into a traffic of profit which would outrage human feelings and disgrace human justice (*The Schooner Emulous*, 1 *Sumner*, 210."

The dissenting opinion also ignores the principle that a salvage contract will be disregarded in order to award the salvor an *increased* compensation, if the agreement is for an unreasonably small sum, as well as to diminish it if unreasonably large.

An amount in excess of their contract was awarded the salvors in the *Kingalock*, Spink's Reports, 263, 265, where the Court said: "It is not necessary, in order to vitiate an "agreement, that there should be moral fraud; it is not "necessary, in order to make it not binding, that one of "the parties should keep back any fact or circumstance of "importance, *if there should be misapprehension, accidentally or by carelessness.*"

(4.) The antiquity of this rule in the maritime law is clearly pointed out, in the opinion of the Court, by Judge SPEER.

A similar rule obtains generally in the modern maritime law. For example, the right of the Court to disregard an agreement as to amount and to award a salvage compensation is expressly conferred by the German Commercial Code, Article 743 (*Wendt's Maritime Legislation*, 3rd Ed., London, 1888, p. 751): "When during the danger an "agreement has been made as to the amount of the "salvage or payment for assistance, such agreement may, "nevertheless, be disputed on the plea that the amount "agreed upon was excessive, and the reduction of the "same to an amount more in accordance to the circum-"stances of the case may be demanded."

In a recent article upon the Scandinavian Code, contributed by Dr. Raikes to the *Law Magazine and Review* (Vol. 21, 4th series, p. 132), he shows that Article 27 thereof provides:

"If whilst the vessel was in distress a commander or owner of ship or cargo has made a salvage agreement, the person liable to pay on the agreement may within two months after the agreement bring the question of amount before the Court, which can reduce the amount agreed on if it is considerably in excess of a reasonable payment for the *service performed.*

"If it is agreed that the amount shall be settled by arbitration, or in other similar way, the person liable to pay may repudiate the agreement if he does so within 14 days."

The author further says:

"The Swedish version originally gave six months in which to move to set aside the agreement, and declared agreements to arbitrate the amount invalid. This was amended as from 1st July, 1894, and now runs as follows:

"'If whilst the vessel was in distress a commander or owner of ship or cargo has made a salvage agreement, the person liable to pay on the agreement may, nevertheless, have it reduced by legal process when the agreed sum is considerably in excess of what is fair. If the money has been paid whilst the danger existed the proceedings must be taken within six months from the date of payment, or they will be barred. If the agreement is that the amount of salvage shall be settled by arbitration or in any such way, it does not bind the person liable to pay the salvage if he gives notice of his repudiation of the agreement to the salvors within a fortnight of the day in which it was made.'

"The Norwegian version has 14 days as the limit of time in both clauses."

II.

The Circuit Court of Appeals rightly held that the agreement was for an unreasonable and excessive compensation, which would not have been agreed to by the owners of the vessel if they had been fully informed of the facts.

There is nothing to add to the conclusions stated in the opinion of the Court upon this point. The questions of unreasonableness and of excess are essentially questions of fact, which cannot be passed upon by the Court without study of the entire record. If, upon an application for a writ of *certiorari*, the Court will consider this question of fact, then we respectfully beg reference to the appended brief used in the Circuit Court of Appeals, in which all questions of fact will be found fully dealt with, and to the record.

At page 30 of the brief will be found a comparison between the services performed for the *Elfrida* and those

performed for the steamship *Hesper*, stranded a few years before, off Galveston, where Judge PARDEE, for larger services performed for a vessel and her cargo of far greater value, reversed a decree of the District Court, and reduced an award from $8,000 to $4,200.

The essential facts in regary to the services performed for the *Elfrida* are that during the 13th and 14th of October, after the libelants, Clarke & Co., had learned through the charterer of the ship, that the master would make an agreement for $22,000, the libelants hired a forty-five foot schooner, of fifteen tons burden (fols. 475, 476), upon which they loaded some anchors, cables and provisions, in Galveston (fols. 473, 474). These they took to Velasco, about forty miles away, in tow of the tug *Josephine*, on the 14th (fol. 187). The salvage agreement between the master and Clarke & Co. was signed on the 15th, after the arrival of the expedition at Velasco (fol. 159). Before signing the agreement, and after arrival in Velasco, on the 14th, the libelants arranged for a lighter with Brock, who had formerly been a competing salvor. This was testified in Clarke's examination (fol. 161): "Q. When did you hire the lighter from "Brock? A. It was the day I arrived there, the 14th, I "think, *before the contract was signed.*" On the 16th, by the aid of Brock's barge, two of the libelant's anchors were planted seaward, on the steamer's port quarter, and two of the *Elfrida's* anchors were planted on her starboard quarter, all about 1,540 feet astern of the vessel (fols. 56, 62). Cables, supplied by the salvors, were carried to the steamer's anchor cables, attached to her anchors, and to Clark's own anchors, the *ends of the cables being brought aboard the steamer and attached to her steam winches*, which were located on deck. Two winches were attached to each rope, so that the *four winches were brought to bear on the two heavy cables* that went out to the anchors astern. A rope from an anchor on the starboard side were carried to the steamer's windlass forward (Rec., 56, 57, 110, 291). The steamer's tanks were then pumped out, so as to lighten her draft (330-331). All these arrangements were perfected during the 16th and 17th, prior

to three o'clock (fol. 900). The salvors then directed the master to get up steam, both for the main engines and for the steam winches, which are small hoisting engines situated on deck; and thereupon the *steamer began to haul herself off the beach under her own steam alone, not even a tugboat assisting in the pulling* (fols. 900, 170, 171, 172, 873, 875, 881, 895). She started almost immediately after strain was put upon the rope, and went along with slight jerks and bumps until she was afloat (fols. 907, 901, 874). When first afloat, owing to the failure to place any anchor on her port side, an easterly current bore her over against the submerged jetty. About an hour or two were consumed in getting her away from the jetty (fol. 174). She was finally afloat in clear water, and proceeded to sea under her own steam at 7.30 P. M. (fols. 950-960), in about *four hours from the time the winches and propeller were put in motion to haul her off the beach.*

The value of the property employed by the salvors was not attempted to be shown by any competent evidence.

Libelant Clarke did not touch the subject at all, though twice examined. There are vague statements at different places in the testimony that a plant of considerable value was in use, but no definite information as to its value appeared to be obtainable. It was suggested that two tug boats and two schooners, with a large number of anchors and cables, had been used, but upon cross-examination of Captain Clarke, it appeared that only one tug and one schooner were used (fol. 187), with Captain Brock's barge. The value of the tug was not shown; moreover the tug was not used, except to free the vessel when she touched the jetty, after being carried over against it by the current, owing to the absence of any anchor on the port side. The steamer was then in deep water, and the touching upon the jetty was evidently a trifling matter. The schooner did not belong to Clarke, but was only chartered to take the anchors down from Galveston to Velasco. The agreement of charter was $35, but $100 was paid (fol. 476). Brock's barge is said to have been worth about $6,500, but there is no suggestion that it was actually in any peril (fol. 164). Some of the wit-

nesses testified that a large number of men, as many as 25 or 30, were taken down from Galveston, but Clarke himself admits that 15 or 16 all told was about the number (fols. 156, 157). The number of anchors was not clearly shown, nor was any attempt made to state their value, nor that of the cables.

Judge PARDEE'S conclusion that the salvors' property engaged in this work was worth $50,000 is merely a surmise. The salvors' outlay was not proved, but, from the facts shown, could not have been great.

The owners testify they would not have sanctioned the agreement, if they had known all the facts (Brief, *post*, pp. 62, 63).

III.

The petition for this writ and the dissenting opinion of Judge Pardee contain a number of errors to which attention should be called.

It is not intended to discuss at length the different conclusions arrived at in the opinion of the Court and in the dissenting opinion. Such an inquiry would involve in effect a retrial of the cause upon this application.

(1.) Judge PARDEE finds that the *Elfrida* was aground "within the limits of the port of Galveston," the intimation being that she was at a place where assistance would have been readily available. While, perhaps, Velasco may be within the customs limits of the port of Galveston, it is about *forty miles away;* and the proof was uncontradicted that there were no salvors, even in Galveston, who could float the ship, except the libelants and a competing salvor named Brock, and they could only do it by combining their forces (fols. 512, 527, 490, 918, 924). Both had tugboats (fols. 187, 188). Clarke had heavy anchors, but no lighters from or by which they could be planted (fol. 161), while Brock had lighters, but no anchors (fol. 470). It was necessary, therefore, that both

should join in the salvage operation, as the event showed (fols. 161, 548, 919).

(2.) The Judge also found that the vessel was "in water "from 6 to 8 feet in depth, according to the tides." The amended libel, filed after the proofs were nearly all completed, expressly admitted that the vessel lay in *9 feet* of water at the highest tides (fol. 54).

(3.) He further finds that she was imbedded in the sand about two feet. But the evidence showed that the sand was quick at this point: that the vessel settled in it to her usual draft when afloat (fol. 391) and moved or rocked, where she lay, except when the water was very smooth (fol. 451).

(4.) He also found that the steamer's draft was "eleven "feet ten inches, which could not be reduced by discharge "of ballast or otherwise so as to get heroff." The record shows that the bottom was almost flat at this point; and that while the draft was eleven feet *six* (not ten) aft (fol. 804), it was only *nine* feet forward (fol. 912); and that her draft *could be reduced eighteen inches by pumping out her water ballast* (fol. 916). The majority opinion finds that the vessel must have been very nearly afloat when her ballast was pumped out: and this is also confirmed by the readiness with which she moved when the steam power was first put on the winches.

(5.) In the dissenting opinion stress is also laid upon the fact that the master was in communication "with the *agents* of the ship;" and in the petition (p. 9) he is referred to as "surrounded by his friends and those "whose interests were the vessel's interest." The only "agency" that Moller & Co., to whom reference is thus made, occupied was by virtue of a charter of the steamer to them, in which there was a provision that they should be permitted to act as agents of the vessel in transacting the ship's business, *under the charter-party*. In point of fact, the ship had *no agents* at all in the United States, except the master, as the ship had not arrived in port and had never entered upon the charter-party, and Moller's agency had never attached. The evidence leaves no doubt that

Moller, who was a friend of Clarke, and father-in-law of one of the counsel engaged in the case, acted from first to last in the interest of Clarke instead of in that of the ship. He testified for libelants on the trial. On learning of the stranding he at once recommended Clarke to the master as a "very *practical* wrecker" (fol. 715); and Moller's local representative at Velasco urged his appointment upon the master (fols. 237, 239). Moller subsequently intervened to prevent the employment of Brock (fols. 242, 244). As soon the ship was off Clarke telegraphed to have Moller's father-in-law, Mr. Wilson, "get papers ready, seize *Elfrida*" (fols. 736, 524). Moller admitted that he detained the vessel at Velasco, after she was free, to give Clarke an opportunity to seize her, and telegraphed his representative there to that effect (fols. 522, 523). He further testified that he had promised Clarke that he wouldn't let the ship go until he (Clarke) had got her seized (fol. 523). It is impossible to regard a man working from start to finish in the interest of his friends, the salvors, as an *agent*, in any real sense, of the owners of the ship.

(6.) In the dissenting opinion stress is also laid upon the offer of the salvors to the captain to undertake the floating of the *Elfrida* for such salvage compensation as the Court might warrant. This is dealt with in the majority opinion, where it is pointed out that, although this offer was, *at first*, made, the owners had no knowledge of it, had no chance to accept it, and that *afterwards the salvors not only declined to work unless they had a contract for* $22,000, but were exceedingly urgent for an immediate acceptance of an agreement on that basis, under threats of requiring a larger sum unless the contract was made.

(7.) In allusion to the salvors' preparations for the service, and to the plant and vessels they had employed therein, Judge PARDEE refers to the evidence of large preparations and large numbers of boats and lighters stated in the direct examinations. On cross-examination, however, it was shown that there were, in fact, one tugboat, but one schooner and one lighter, three anchors, and a total of about fifteen men, employed on the service, as is pointed out in the majority opinion.

(8.) The valuation placed upon the property of the salvors engaged in this enterprise, as stated by the Judge at $50,000, is merely a surmise, unsupported by the proofs.

(9.) The learned Judge also exaggerates the value of the *Elfrida*. The evidence of the only witness who was qualified to express any opinion upon this point shows that her value did not exceed $70,000, as found in the majority opinion. The amount of the salvage decreed therefor in the District Court, instead of being "twenty or twenty-five per cent. of the salvage property," was *over thirty-one per cent.*

(10). It was on the assumption that the award did not exceed twenty or twenty-five per cent. that Judge PARDEE said, "I am clearly of opinion that the amount agreed "upon is not *excessive to such an extent* as to be unrea-"sonable." He felt it was excessive in some degree. If he had correctly found the value of the vessel at $70,000, and the percentage at above thirty-one per cent., he would probably have found it "excessive *to such an extent*" as to be unreasonable.

(11.) The Judge who decided this case in the District Court was greatly pressed for time, owing to the large criminal calendar which was awaiting his attention. He therefore took no time for consideration. The whole of the claimant's testimony except that of the pilot was taken out of Court, so that he had no opportunity of seeing those witnesses. He had no briefs and he took no time to consult authorities. His decision was rendered immediately upon the close of the arguments, and is therefore not justly entitled to the weight which it should receive if it had been rendered under the ordinary circumstances.

(12.) The cable sent by the owners to the master, authorizing him to accept tender of 4,580 pounds if lower was impossible, which Judge PARDEE refers to as an express authorization from the owners of this agreement, was sent by them upon a misapprehension of the vessel's posi-

tion and danger, owing to the master having communicated to them only partial accounts of her situation, and having sent them two messages on the previous day regarding his fears of sand-banking, which were not justified by any indications then present, nor by the reasonable probabilities (fols. 799, 813, 814). At the time they sent the cable referred to they had no information of the vessel's position, except as was contained in four messages from the master (fols. 568, 571), and one from Moller (fol. 628). The master had not informed them that the libelants had once offered to salve the vessel for a sum which an admiralty court would allow. If they had known of this offer they would have accepted it (fols. 572, 573). They authorized the acceptance of the tender under the supposition that the services would not be performed under any other agreement than for a specific amount (fol. 590).

They had not been informed of the vessel's draught, the depth of water she was lying in, how much greater her draught would have been with the water ballast pumped out than the depth of water under her, nor did they know anything as to the claim of sand-banking, except such as was contained in the master's telegrams (fols. 573, 574). They state unqualifiedly that if they had known that she was lying easily on a sandy bottom, head on the beach, with hardly any perceptible accumulation of sand around her, in water less than a foot shallower at one end of her than her draught would have been with her water ballast tank empty (a fact admitted in the amended libel, fol. 54), and that the weather was fine, with no immediate prospect of change, which is also admitted, they certainly would never have authorized the agreement for such a large sum (fols. 574, 581, 582). Had the master informed them of these facts they would have appointed an agent to investigate and report (fols. 576, 577).

They admit that it was the master's duty to advise them of these matters, but add that the master did not even mention the circumstances in any of his letters (fol. 590).

The libelants have not been prejudiced in any way by the master's failure to inform his owners fully of the vessel's position before pressing them, as he did, for an ac-

ceptance of the tender. They will be amply compensated however the case goes, while the owners of the property would be seriously prejudiced by having to turn over to the salvors, for not a great service, almost one-third of the gross value of their ship.

(13.) Notwithstanding the learned Judge found that the charges made by the claimant as to collusion and false representation by the salvors was wholly unsupported by proof, there was very strong circumstantial evidence of collusion disclosed by the record (see appended Brief, pp. 63-65); and there was express testimony of false representations of the danger of sand banking around the vessel (*Idem*, p. 7), which libelant Clarke, although twice examined, did not deny.

(14.) The cases referred to in the dissenting opinion, if read in the light of their special facts, do not support the conclusions for which they are cited as authority.

In the case of The *Agnes I. Grace*, 49 Fed. Rep , 662, it was expressly found in the District Court that the amount stated in the agreement *was a reasonable and just compensation for the services actually performed;* and, although the Court of Appeals thought the amount a trifle high, they nevertheless affirmed the decree upon an express finding that "this Court *does not deem it suf-* "*ficiently unreasonable* to disturb the *judgment of the* "*Court below.*"

The remarks of Mr. Justice STORY, in *Bearse* v. *Pigs of Copper*, 1 Story, 323, which are quoted, while no doubt correct as an abstract proposition, should be read in connection with his remarks upon a case of excessive contract in The *Emulous*, 1 Sumner, 207, where he said that "no system of jurisprudence, founded upon moral or "religious, or even rational principles, could tolerate "for a moment the doctrine that a salvor might avail "himself of the calamaties of others to force upon them "a contract unjust, oppressive and exorbitant." Moreover, the quotation made in the case of the *Pigs of Copper* had no bearing upon the case there in hand, as in the next sentence Judge STORY said, "Now, with respect to the

" salvage service here in controversy, *there is not, in my* " *judgment, any ground to assert that any fixed or definite* " *contract,* for the service existed between the parties."

The case of The *Alert*, 56 Fed. Rep., 724, from which a quotation is taken, was one in which the facts were totally different, the contract there in question having been made between salvors and agents of owners in New York City, for a salvage expedition to go to the relief of a vessel and cargo stranded on the coast of South America. The amount specified was found not to be unreasonable to cover the great outlay required and the services actually performed.

The *Silver Spray*, Brown's *Admiralty*, 354, was a case where the Court declined to give the salvors a larger compensation than the amount specified in their agreement. This case is opposed in principle to the *Kingaloch*, Spink's Rep., 263.

The remarks quoted from the opinion of Judge HUGHES in the case of the *Sir William Armstrong*, 53 Fed. Rep., 150, are contrary to the decision of this Court in *Post* v. *Jones*, 19 Howard, 150, and the *Tornado*, 109 U. S., 110.

It is well known that the tendency in the eastern district of Virginia is to award very large sums for salvage. The Court of Appeals of that Circuit on more than one occasion has diminished these awards (*e. g.*, the *Phœnix*, 62 Fed. Rep., 487, where $15,000 was taken off an award).

In the case of the *H. D. Bacon*, Newberry, 280, Judge WELLES, whose opinion is quoted, stated on page 279 that the weight of authority was to the contrary, and concluded his decision with an *express finding that the amount stipulated in the agreement was just and reasonable for the service actually performed.*

The passages quoted from the decision of Judge SPEER in the *Agnes I. Grace*, 41 Fed. Rep., 664, and from *Jones on salvage*, p. 99, really sustain the conclusion arrived at in the majority opinion, rather than those for which they are cited.

IV.

The case is not one of such gravity or importance as to justify an allowance of the writ.

The controversy is essentially one of fact, not of law; and, as the case now stands on the decision of the Circuit Court of Appeals, the salvors will receive a very large compensation for their services, and in addition thereto, a sum sufficient to indemnify them against all their expenses of litigation. These expenses, it should be remembered, were needlessly incurred, as the plaintiffs admitted in their answer that they were liable to pay for a salvage service, and offered to submit to a decree for a salvage compensation (fol. 89).

Owing to the short notice received of this intended application, an insufficient time is afforded for the preparation of a full brief in opposition to this application. The appelants, therefore, ask reference to their brief in the Circuit Court of Appeals, hereto appended, for further arguments upon various points discussed in the opinion of the Court and in the dissenting opinion.

NEW YORK, February 11, 1897.

Respectfully submitted,

CONVERS & KIRLIN,
Proctors for Claimants of the "Elfrida," Appellants.

J. PARKER KIRLIN,
Of Counsel.

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Supreme Court of the United States,

October Term, 1898.

CHARLES CLARKE and ROBERT P. CLARKE, Petitioners, Appellants, AGAINST The Steamship ELFRIDA, Pyman, Bell & Co., Claimants, Appellees.	No. 60.

BRIEF FOR CLAIMANTS, APPELLEES.

Statement.

This cause is before the Court by virtue of a writ of *certiorari* issued to the United States Circuit Court of Appeals for the Fifth Circuit, March 11, 1897 (Rec., p. 280). The libel was filed in the Eastern District of Texas, October 24, 1894. It claimed the sum of $22,000 for salvage services rendered to the steamer under an alleged contract (p. 8). The claimants defended on the ground that the contract was inequitable; that it stipulated for an excessive and unreasonable compensation for the services, and that it was obtained from the captain by compulsion and by unfair means (pp. 17-19, 20 28). The captain himself verified the first amended answer, alleging these defenses (p. 20).

The cause was heard at Galveston before Honorable David E. Bryant, Judge for the Eastern District of Texas, who gave his decision at the conclusion of the argument, without taking time for consideration, and without having briefs. No opinion was delivered in the District Court.

The findings of the District Judge are recorded in the decree as follows (p. 254):

"The Court finds from the evidence that the services rendered by the libelants in saving the steamer Elfrida, her tackle, apparel and furniture, were and are salvage services, and are entitled to be paid for and compensated as and for salvage services.

"The Court further finds from the evidence that the said salvage services were rendered by the libelants in saving the said steamship, her tackle, &c., under a contract in writing, made between the libelants and Benjamin Burgess, the master of the said steamship Elfrida, in possession of said steamship at the time, and, as such master, was duly authorized to make the same; and the Court further finds from the evidence that said contract was a lawful contract, and that the same was entered into by the master of the said steamship with full knowledge or means of knowledge of said master and of the owners of said steamship, of all the conditions then existing, and that the amount named in said contract was not unreasonable under the said conditions."

It will be noticed that he made no finding as to the reasonableness of the amount agreed upon for the services rendered.

From this decree, the claimants appealed to the Court of Appeals for the Fifth Circuit, where the decree below was reversed.

The Court of Appeals found that the contract was inequitable; that it provided for an unreasonable and excessive compensation for the services performed; that in the negotiations for and the making of the contract, the parties did not stand on an equal footing, and that, accordingly, it should be set aside, and a salvage compensation awarded to the libelants in the sum of $10,000 (Opinion, pp. 264–274).

Judge Pardee dissented from the decision of the Court (p. 274).

After an application for a rehearing in the Court of Appeals had been made and denied (pp. 261–264), the libelants sued out this writ.

Facts.

The salvage services were rendered under the following circumstances:

On Friday, October 5, 1894, the Elfrida, a steel steamship of 1,454 tons net register, 290 feet long, bound inward, in ballast, for the port of Velasco, Texas, grounded on the bar between the jetties which extend from the right and left banks of the river, about a mile into the gulf.

Her draft was 9 feet forward (Boylen, 237), and 11 feet 6 inches (Burgess, 207), or 11 feet 10 inches aft (Coveney, 90).

During the 5th and 6th of October unsuccessful efforts were made to haul her off with a kedge anchor, and by backing the engine, but her position continued the same until the night of October 6th (pp. 83, 245), when the sea rose, carrying her over the submerged outer end of the jetty, and some distance further shoreward on the beach (pp. 83, 84). Her positions on the bar and afterwards on the beach are shown in the captain's diagram (p. 322; explained 237).

The position in which she brought up on the night of the 6th was a cable's length to the west of the west jetty (p. 234). That part of the jetty which was above high water projected seaward beyond her stern (p. 112), and sheltered her from easterly winds (pp. 75, 89). She lay parallel with the jetty (p. 114) about four or five hundred feet from the beach head on to it (p. 196), and about a thousand feet from water of sufficient depth to float her (p. 196; amended Libel, p. 12). The shore at this point is very flat (pp. 96, 99). The bottom consists of a layer of quicksand about ten feet deep, with underlying blue clay (p. 101). The steamer settled in the quicksand to her normal draft (p. 101), rocking and moving in it whenever there was a slight sea (p. 118). She lay in 9 feet of water at high tide

(pp. 225, 208; Ex. 16, p. 184; Ex. 30, p. 167; Amd. Libel., p. 12).

The pilot, Coveney, sounded around the vessel just before she came off on October 17th, and found nine feet of water at her stern, and seven at her bow:

"Q. What water was there around her where she was stranded, before they began to move her? A. Seven feet and nine inches aft. I sounded it at the time. On top of high water, it was a 3.2 tide."

The answer was erroneously transcribed. What the witness said was, "Seven feet *forward*, nine *feet* aft." The answer was so understood by both counsel, as appears from the following questions asked immediately afterwards during his examination:

"By Mr. Kirlin (p. 87): Q. You say the steamer had 7 feet and 9 feet of water at the time she began to move. What was her draft then? A. 9 feet 6 inches aft and 9 feet forward."

"By Mr. Stubbs (p. 89): Q. You spoke of having sounded on the beach, and found 4 feet forward and 6 feet aft. That was on the 9th; *and when she was taken off* (17th), *it was 7 feet forward and 9 feet aft.* Then you spoke of a 3-foot tide; was that an unusually high tide? A. Yes, sir."

The lightening of the steamer's draft, here referred to, is accounted for by the discharge of the water ballast.

It was ascertained, therefore, by soundings and observations, that her draft aft was 9 feet 6 inches, and the depth of water aft was 9 feet; that her draft forward was 9 feet, and her depth of water forward was 7 feet. She lay in the sand 6 inches aft, and two feet forward.

There was no exceptionally rough weather while the ship was ashore (pp. 234, 235, 236, 241, 225, 226, 228, 242, 244; Report, p. 253). It was fine during the time of the service, and continued so indefinitely thereafter.

On October 14th, as the libelant testifies, he learned from the character of the vessel, and from Lloyd's agent, that his tender for the work was accepted (p. 35). He at once hired the schooner *Louis Dolsen* (p. 36) of 15 tons, 45 feet long, for which he paid $100 (p. 125), to take his

plant to Galveston in tow of his tug *Josephine* (p. 36). He took with him about twelve men (p. 36).

The expedition arrived at Velasco on the same day, or on the 15th (p. 36). On arrival at Velasco, Clarke engaged a derrick lighter for use in laying the anchors (p. 37).

The agreement between the captain and the salvors was signed on the 15th (p. 31). On the 16th and 17th, the salvors were at work planting the anchors and connecting cables from them to the winches of the ship. In this work, both Clarke and the mate of the ship agreed that only *one* tugboat and *one* lighter were employed (Scott, p. 226; Clarke, p. 45). Two anchors weighing about seven thousand pounds each, the property of Clarke, were carried about fifteen hundred feet away on the starboard or east quarter of the ship (p. 45), and two anchors weighing about three thousand pounds each, the property of the *Elfrida*, were placed a similar distance away on the south or port quarter (p. 39). The cables connected with these anchors were carried around the ship's steam winches. Another anchor, apparently the property of Clarke (who had three in the service; Scott, p. 226), was laid off the starboard side, attached to a cable which was brought to the ship's windlass over the starboard bow (p. 225). The work of laying the anchors and connecting the cables attached to them, with the steam winches and windlass, was completed about 3.30 o'clock on October 17th, and the water ballast, at the direction of the salvors, had been pumped out. The *Elfrida's* engines, winches and windlass were then started by her own steam, and in less than a half hour she began to move herself off. She went slowly for the distance of about a thousand feet, when she floated clear, but was carried by the current against the west jetty. Clarke's tug, the *Josephine*, then, for the first time, took hold of her, and towed her away from the jetty. At 7.40 P. M., of October 17th, four hours after the work of hauling her off was begun, she was free and clear of everything, and put out to sea, under the control of the pilot.

Subsequent examination of her bottom in the dry dock at Newport News, showed that she was wholly uninjured,

except for a slight indentation, about a foot long in the bilge, which was probably caused by contact with the jetty.

The value of the vessel at the time of the stranding was $70,000 (Bell, p. 148).

The evidence in connection with the making of the salvage agreement is stated under Point V.

POINTS.

I.

The Court of Appeals had the right and was bound to consider the merits of the services performed, in judging of the reasonableness or excess of the sum stipulated for in the agreement, and might have set the agreement aside for excess alone.

The differences of opinion in the Court of Appeals centred mainly in the question whether, in determining the reasonableness of the agreement, the Court was justified in regarding the facts and circumstances of the services and the result achieved, or whether it was limited to a consideration of the position of the parties and the situation of the property, as they existed at the time the agreement was made.

The dissenting opinion of Judge Pardee proceeds upon the theory that a Court of Admiralty is bound, like a Court of Law, to the letter and figure of an agreement, and that notwithstanding the amount stipulated for compensation might be excessive for the services actually performed, it must be enforced, unless inequitable in its inception.

The opinion of the majority, on the other hand, holds that a Court of Admiralty is not bound to decree the specific performance of a contract for salvage, unless it can sanction its terms as equitable and conformable to the actual merits of the case.

It seems to be conceded in both of the opinions in the Court of Appeals, and is admitted in the appellants' brief here, that $22,000 *is* excessive for what the salvors did.

Judge Pardee was of opinion "that the amount agreed upon *is not excessive to any such extent* as to be unreasonable" (p. 276), and that excess alone was not enough to vitiate the agreement; and as he found no other ground for setting it aside, he favored a decree for specific performance.

The decision of the majority, announced by Judge Speer, held that the agreement was exorbitant for the work done, and that this was a sufficient reason for declining to sanction it (p. 270); but it also found that the parties did not deal on an equal footing in reaching the agreement (p. 272), and hence, on both grounds, it reversed the decree below, and awarded to the salvors the sum of $10,000, as a reasonable compensation for their services.

The brief of the appellants here does not seem to question the conclusion that the proposed award of $10,000 *would* afford them ample compensation, or that the amount stipulated for was in some degree excessive.

It is proposed to contend in this brief that an agreement to pay a certain sum for salvage services is not binding upon the property salved, nor upon a Court of Admiralty, unless it can be sanctioned as a fair and just compensation for the services actually performed; that the jurisdiction of admiralty to set aside such agreements for exorbitancy is an ancient and original jurisdiction in the Court, exercised long before a similar jurisdiction existed in courts of equity; and that, in the admiralty practice, an agreement for a specific amount is looked upon as evidence only of what the parties at the outset may have thought would be proper, but is not conclusive upon the judicial discretion in filling the *quantum* of compensation.

(1.) Origin of the jurisdiction.

The practice of setting aside agreements for salvage services, upon the ground of excess, extends very far back in the history of the law.

In *The Roll of Oleron*, Art. 4 (2 Black Book of the Admiralty, ed. Twiss, p. 437), a compilation of maritime judgments made near the end of the twelfth century, this rule is laid down:

"And yf it were so, that the mayster and the marchauntes have promised to folke, that shuld helpe them to save the shyp and the said goodes, the thyrde parte or half of the said goodes which shuld be saved for the peryll that they be in, the justyce of the country ought well to regarde what payne and what labour they have done in saving them, and after that payne, notwithstanding that promise which the said mayster and the marchauntes shall have made, rewarde them. This is the judgment."

Judge Peters, in the *Ship Catharina*, 1 Peters Adm., 104, 107–108, gives this account of the origin of the Laws of Oleron:

"The laws of Oleron occupy now a portion of the famous Black Book of the British Admiralty, which is consulted by all their courts on subjects of maritime and commercial controversy. These laws of Oleron were not entirely of British growth. They were compiled at first, as French authors assert, and from the face of them it would seem probable, by Queen Eleanora, Duchess of Guienne, for her continental dominions, and afterwards improved and enlarged by her son, Richard the First, of England, in no small degree from the maritime laws and customs, not only of his own country, but also from the laws and customs prevailing among the continental trading nations. Of these, the Saxons were, at an early period, the most conspicuous and practically intelligent in nautical affairs. They introduced into England their maritime knowledge, as they did some valuable principles of the common law. What was entitled the Saxon shore extended from the western parts of Denmark to the western parts of France. The excellence and importance of these laws of Oleron are evinced by a contest for their origin between two great nations, who have wisdom and liberality enough to follow them, be the fact of origin how it may."

A similar account is given of their origin, in 1 *Azuni's Maritime Law*, Ch. 10, Art. 10, pp. 377, 381, where it is said that the Roll was first published by Queen Eleanora, Duchess of Guienne, about 1150, and was introduced into

England by Richard I., some time between that date and 1200. To the same effect 21 *Encyclopedia Britannica* (9th Ed.), *Article, Sea Laws*, pp. 583, 584.

It does not appear that contracts and other instruments were canceled by the Courts of Chancery, before the reign of Henry the Sixth, two centuries and a half after the Roll of Oleron was made a part of the law of England in the reign of Richard the First (*Spence, Equitable Jurisdiction of the Court of Chancery* (Phila., 1846), p. 624; 2 *Pollock & Maitland's History of English Law Before Edward I.*, p. 538, *Story, Eq.*, Sec. 39; "*Early English Equity*," by Judge Holmes, 1 L. Q. Rev., 162).

The rule laid down in the Roll of Oleron has survived in the codes or in the common law of all the maritime countries of Europe. Some have expressly enacted similar provisions in their codes, while others follow the principle in their jurisprudence, as a part of the ancient law of the sea.

(2.) THE CONTINENTAL DOCTRINE.

The German Commercial Code, Art. 743, provides:

"When during the danger an agreement has been made as to the amount of the salvage or payment for assistance, such agreement may, nevertheless, be disputed on the plea that the amount agreed upon was excessive, and the reduction of the same to an amount more in accordance to the circumstances of the case may be demanded."

Wendt. Maritime Legislation (3rd Ed.), 751.

In a recent article upon the Scandinavian code, contributed by Dr. Raikes to the *Law Magazine and Review* (Vol. 21, 4th Series, p. 132), Article 27 thereof is translated as follows:

"If, whilst the vessel was in distress a commander or owner of ship or cargo has made a salvage agreement, the person liable to pay on the agreement may within two months after the agreement bring the question of amount before the court, which can reduce the amount agreed on if it is considerably in excess of a reasonable payment for the *service performed*,

"If it is agreed that the amount shall be settled by arbitration, or in other similar way, the person liable to pay may repudiate the agreement if he does so within 14 days."

The author further says:

"The Swedish version originally gave six months in which to move to set aside the agreement, and declared agreements to arbitrate the amount invalid. This was amended as from 1st July, 1894, and now runs as follows:

"'If whilst the vessel was in distress a commander or owner of ship or cargo has made a salvage agreement, the person liable to pay on the agreement may, nevertheless, have it reduced by legal process when the agreed sum is considerably in excess of what is fair. If the money has been paid whilst the danger existed the proceedings must be taken within six months from the date of payment, or they will be barred. If the agreement is that the amount of salvage shall be settled by arbitration or in any such way, it does not bind the person liable to pay the salvage if he gives notice of his repudiation of the agreement to the salvors within a fortnight of the day in which it was made.'

"The Norwegian version has 14 days as the limit of time in both clauses."

Art. 166 of the Maritime Code of Finland provides:

"If at the time of the accident the owner of the ship or of the goods has accepted assistance on conditions too onerous, the contract is void; the Court examines and then fixes itself the amount to be paid" (3 R. I. D. M., 74).

Art. 568 of the Commercial Code of Holland provides:

"Every agreement or transaction concerning the price of assistance or of salvage may be modified or annulled by the Judge if it has been made in the open sea *or at the time of stranding*. Nevertheless, when the danger is past it shall be lawful for both to make regulations or agreements as to the price of assistance or of salvage" (3 R. I. D. M., 374; The *Schiedam*, 48 F. 923).

Under Art. 127 of the Italian code the contract is not binding if it was made at sea or at the time of the disaster.

Ghiones v. *Demythiener*, 3 R. I. D. M., 766.

The jurisprudence of other European countries is to the same effect as the provisions of the codes just quoted: *France*, Court of Cassation, 3 R. I. D. M., 15; 5 do. 486; 9 R. I. D. M., 185; *Belgium*, 3 R. I. D. M., 334 (a stranding); *Greece*, 10 R. I. D. M., 476; and *Denmark*, 5 R. I. D. M., 406.

Further discussion on the subject may be found in a valuable article entitled "*A Resume of the Principles Prevailing on the Subject of Salvage and Assistance in the Legislation and Jurisprudence of the Principal Countries*," by M. Giambattista Benfante, in 5 R. I. D. M., 564.

In the *Navire Garibaldi*, 13 R. I. D. M., 94, decided by the Tribunal of Commerce of Saint Nazaire, a contract for salvage services to be performed to a steamship stranded in the Bay of Saint Nazaire for 2,000 francs was set aside upon the ground that the captain consented to the sum stipulated in the fear that his vessel would be lost, and that the price agreed upon was an exorbitant sum for the services. The Court awarded 500 francs.

In the *Navire Titian*, 9 R. I. D. M., 185, where a vessel was stranded and a tug declined assistance except upon agreed terms, the Court of Appeal of Aix held that the captain of the tug "imposed conditions extremely rigorous and out of proportion to the expenses which he would incur and the risks he would have to run," and annulled the contract.

M. Autran, the editor of the review, adds a note, commenting on that case as follows:

"The French law contains no special provision regarding the validity of contracts for salvage made at sea; the question of sustaining or annulling them is rather a question of fact than of law. The foreign law is generally favorable to the rescission of such agreements."

The Belgian Government, on the occasion of the International Exposition at Antwerp, in 1885 proposed an International Congress of commercial law, having for its object the unification of legislation, in matters of contracts of transportation, bills of exchange, and of maritime law. Eighteen governments responded to the invitation, as well as a large number of jurists, professors

of law, commercial associations, representatives of legal journals, &c. Their deliberations covered ten topics. On the subject of "Assistance and Salvage," resolution No. 44 provided:

"Payment for assistance or for salvage shall be determined upon consideration of the following circumstances: The skill shown, the time consumed, the service rendered to the ship, to persons and to property, the expense outlayed, the number of persons actively engaged, the danger to which those persons have been exposed, the danger that threatened the ship, the persons and the property saved, and finally, the value of the property saved, deduction being made for expenses. Passengers whose lives have been saved need not contribute to the sum awarded for assistance. *Every contract made while the danger continues is subject to rescision.*"

M. Autran's Report of the Proceedings of the Congress, 1 R. I. D. M., 425.

The Congress of Maritime Law at Genoa, in 1892-3, adopted the same principle in these words:

"Such agreements, in case of exaggeration, are subject to reduction" (8 R. I. D. M., 181).

It may be objected that the foreign codes and jurisprudence are not binding here, except so far as their principles have been adopted into our law. No doubt this is so. They are not cited as being in any sense binding, but only as an argument supporting our contention as to what the true rule should be. To the objection that they are not a part of our law, the answer of Judge Peters in the *Ship Catharina*, 1 Pet. Adm., 104, 110, may be given:

"I shall not contend with those who say, we ought to have a maritime code of our own, about the binding force of all these laws on us. By the general laws of nations, we certainly are bound. These apply most frequently in the Prize Court; but there are many cases of *salvage*, wreck, &c., on the instance or civil side of the Court, which necessarily must be determined under the general law. The wisdom and experience evidenced in the particular maritime institutions of other commercial countries, ought, at least, to be greatly respected. If they serve only as faithful guides, and tried and long-established rules of decision in similar cases, they are of high

and exemplary importance. It must be granted that it is safer to follow them, than to trust entirely to the varying and crooked line of discretion."

(3.) THE DOCTRINE OF THIS COURT.

In the Supreme Court, the rule to be applied with reference to salvage agreements has been dealt with twice incidentally, and in one case it was adjudged to be in accordance with that announced in the Roll of Oleron.

In the *North Carolina*, 15 Pet., 40, a schooner was stranded upon the Pickles Reef, one of the Florida Keys. She was assisted to Indian Key by the wrecking schooner *Hyder Ally*, who took from her deck 110 bales of cotton, when she floated off the reef. On arrival at Indian Key the master referred the amount of compensation to be paid, to the arbitration of two persons described in the survey as "ship masters." The referees awarded 35 per cent. on the value of ship and cargo. The cargo's proportion of the salvage was paid in kind. The captain paid a part of the ship's share in cash, and the balance by draft on his consignees.

The Court considered the merits of the case, and reaching the conclusion that the amount awarded by the arbitrators was unjustly large, decreed that a part of the cargo delivered to the salvors in payment should be returned.

On the general subject Chief Justice Taney (p. 18) said:

"Upon the first question, we have no doubt that there may be cases in which the contract of the captain in relation to the amount of salvage to be paid to the salvors; or his agreement to refer the question to arbitrators, would bind the owners. In times of disaster it is always his duty to exercise his best judgment, and to use his best exertions for the benefit of the owners of both vessel and cargo; and when, from his situation, he is unable to consult them or their agent, without an inconvenient and injurious delay, it is in his power to compromise a question of salvage, and he is not bound in all cases to wait for the decision of a court of admiralty.

"So, too, when the salvage service has not been important, and the compensation demanded is a small one, it may often be the interest of the owners that the amount should be settled at once by the captain, and the vessel

proceed on her voyage, without waiting even a day for the purpose of consulting them. But in all such cases unless the acts of the master are ratified by the owners, his conduct will be carefully watched and scrutinized by the Court, and his contracts will not be regarded as binding upon the parties concerned, unless they appear to have been *bona fide*, and such as a discreet owner, placed in the like circumstances, would probably have made. If he settles the amount by agreement those who claim under it must show that the salvage allowed was reasonable and just. If he refers it to arbitrators, those who claim the benefit of the award must show that the proceedings were fair and the referees worthy of the trust. But in this case the conduct of the captain is without excuse. The salvage demanded was exorbitant, the danger of the *North Carolina* was by no means imminent when she was discovered by the *Hyder Ally*; nor did the latter incur any hazard in going to her relief. The weather was moderate, and she floated in a few hours."

In *Post* v. *Jones*, 19 Howard, 150, a whaling vessel, with a cargo of oil and bone, was stranded near shore in Behring's Strait. There was communication with the shore, and the Court found that the crew, with the boats, could have landed the cargo, but the country was uninhabited, and it could only have reached a market by being removed to another vessel. Three other whaling vessels having come up, the ship and cargo were sold to them by auction; but the Court was not satisfied of the *bona fides* of this transaction. These vessels having subsequently arrived in Sag Harbor, Long Island, the libelants, owners of the stranded vessel and cargo, filed their libel, praying to have possession delivered to them of the oil, &c., or its proceeds, if sold, subject to salvage and freight (p. 156). The Court sustained this libel, awarding a moiety of the salved property as salvage, directing that the other moiety be delivered to the owner, subject to freight theron.

In the course of the opinion, Mr. Justice Grier (p. 160) said:

"The certainty of a liberal salvage allowance for the property rescued will be ample compensation for the possible chance of greater profits, by refusing their assistance, in saving the neighbor's property. It has been con-

tended, also, that the sale was justifiable and valid, because it was better for the interests of all concerned to accept what was offered than suffer a total loss. But this argument proves too much, as it would justify every sale to a salvor. Courts of admiralty will enforce contracts made for salvage service and salvage compensation, *where the salvor has not taken advantage of his power to make an unreasonable bargain;* but they will not tolerate the doctrine that a salvor can take the advantage of his situation, and avail himself of the calamities of others to drive a bargain; nor will they permit the performance of a public duty to be turned into a traffic of profit (see 1 Sumn., 210). *The general interests of commerce will be much better promoted by requiring the salvor to trust for compensation to the liberal recompense usually awarded by courts for such services.* We are of opinion, therefore, that the claimants have not obtained a valid title to the property in dispute, but must be treated as salvors."

In the *Tornado*, 109 U. S., 110, the owners of three steam tugs which had pumping machinery were employed by the master and agent of a steamship sunk at a wharf in New Orleans, with a cargo on board, to pump out the ship for the compensation of $50 per hour for each boat, "to continue until the boats are discharged."

When the boats were about to begin pumping the vessel was seized by a United States Marshal, under a libel for salvage, but the marshal permitted the tugs to pump out the ship. After they had pumped for about eighteen hours the ship was raised and placed in a position of safety. The tugs remained by the ship ready to assist her in case the fire broke out again, during the period of twelve days. They claimed compensation for the entire time, at the contract price. The District Court refused to uphold the contract, but allowed each tug the lump sum of $500 and a similar amount to the crew of each tug.

On appeal by the owners of the tugs, the Circuit Court decreed to each of them the sum of $1,000. On their further appeal this Court affirmed the decree.

After reviewing the facts, Mr. Justice Blatchford (pp. 116, 117) announced the following principles:

"On these facts, we are of opinien that *to enforce the contract as one continuing during the time claimed by*

the libelants would be higlly inequitable; and that as against the insurers of the cargo, the right of the boats to compensation must be regarded as having terminated when the ship and cargo were raised, and the boats must be regarded as having been then discharged, within any fair interpretation which can be given to the contract. A compensation of $50 per hour, for the 18 hours of actual pumping, would amount to $900. *Every agreement for salvage compensation is subject, as to amount, to the judgment of the Court, as to its being equitable and conformable to the merits of the case"* (2 *Parsons on Shipping*, 306; *The Helen and George*, Swabey, 368; *Jones on Salvage*, 94 *et seq*).

The passages from the text books and from the case of *The Helen and George*, which are cited with approval in the opinion of Mr. Justice Blatchford (*supra*), are as follows:

In 2 *Parsons Shipping & Admiralty*, *p.* 306, the rule is stated:

" If, at the time of the service, the salvors make a bargain with the owners of the property in peril, or their servants, as to the amount of salvage, this is *enforced by the Court only so far as it seems equitable and conformable to the merits of the case, and it is wholly disregarded, if it be deemed unconscionable and oppressive to the owners of the property saved*, or entered into under circumstances which amount to compulsion (citing The *Jenny Lind*, Newb. Adm., 443; The *Emulous*, 1 Sumn., 207; *Bearse* v. *Pigs of Copper*, 1 Stor., 314; *Post* v. *Jones*, 19 How., 150; The *Brothers*, Bee, 136; The *Ship Nancy*, Bee, 139; The *Theodore*, Swabey Adm., 351; The *Enchantrees*, Lush. Adm., 93; The *Crus V.*, Lush. Adm., 583; The *H. D. Bacon*, Newb., 274; The *Helen and George*, Swabey, 368).

In *Jones on Salvage* (pp. 97, 98) it is said:

" The Court will also refuse to recognize an agreement where the master improperly or recklessly contracts to pay the salvors an exorbitant amount. In the *Theodore*, Swabey, 351, the salvors induced the master of a vessel which had parted from her first anchor and was driving, with another anchor down, but was otherwise in no danger to enter into an agreement to pay them £200 for bringing the vessel into port, which they did after a service of about four hours; the Court held the agreement

to be an exorbiant one, and pronounced against the agreement and for the sufficiency of a tender of £50 by the owners. * * * If, on the other hand, the agreement should be unjust or inequitable towards the salvors, the Court will refuse to recognize it. And where the owners of a vessel to which valuable services have been rendered whilst she was in a position of considerable danger alleged that the salvors agreed to do the work for eight shillings six pence, the Court regarding this amount as futile, gave the salvors £10 and costs. In *The Phantom*, L. R., 1 Adm., 58, Dr. LUSHINGTON, p. 61, said: 'However much it has been agreed upon by both parties, the Court is in the habit of overruling such an agreement, if it is unjust and inequitable' (The *Kingalock*, 1 Spinks, 263)."

In the *Helen and George, Swabey*, 368, 369, Dr. Lushington said:

"The principle upon which the courts act is that if satisfied that an agreement has been made, it will carry it into effect, unless totally contrary to the equity of the case; but the owner of the ship against whom the agreement is attempted to be enforced may show that it was improperly obtained. *The owner of the ship may contend that, under the circumstances, the sum of money was grossly exorbitant*, and *a fortiori*, if he can show that the agreement was obtained by a fraud or compulsion, no court would hold it to be binding."

In this connection it is pertinent to quote the rule as laid down in two other leading American text books:

In *Marvin on Wreck and Salvage, Sec.* 119, it is said:

"It is also competent for the parties interested to agree upon a stipulated sum, as a salvage reward, for the rendition of salvage services, to be paid only in the event that such services save, or contribute to save, the property. Such an agreement does not alter the nature of the service as a salvage service; but only fixes the rule by which the Court is to be governed in awarding the compensation (Schooner *Emulous*, 1 Sum., 207; *Bearse* v. *Pigs of Copper*, 1 Story, 323; *Otis* v. Brig *Whitaker*, 18 Law Reporter, 496). It is within the authority of a master of a vessel in distress to enter into such an agreement; and, also, within the authority of the master of a salving vessel to bind his owners and crew by such agreement (The *True Blue*, 2 W. Rob., 179). When such agreement is fairly made and fully understood by the salvors, and the condition of the ship is fully disclosed to them or known by them, it will

bind them and become the measure of their compensation; notwithstanding a change of circumstances may increase the labor and difficulty of performance beyond what was originally contemplated by them. But if the condition of the ship was unknown to them, or not disclosed to them, the agreement will not bind them (The *Kingalock*, 26 Eng. L. & Eq., 596; The *True Blue*, 2 W. Rob., 180; The *Graces*, *Id.*, 294; The *Henry*, 15 Jurist, 183; 2 Eng. L. & Eq., 564; The *Resultatet*, 22 Eng. L. & Eq., 620; The *Firefly*, 29 Law Times, 147) And *such agreement will not be binding upon the master or owner of the property, unless the Court can clearly see that no advantage has been taken of the party's situation, and that the rate of compensation agreed upon is just and reasonable.* 'This doctrine is founded upon principles of sound policy, as well as upon just views of moral obligation. No system of jurisprudence founded upon moral or religious, or even rational principles, could tolerate for a moment the doctrine, that a salvor might avail himself of the calamities of others to force upon them a contract unjust, oppressive and exorbitant; that he might turn the price of safety into the price of ruin; that he might turn an act, demanded by Christian and public duty, into a traffic of profit, which would outrage human feelings and disgrace human justice' (The Schooner *Emulous*, 1 Sum., 207; *Laws of Oleron*, Art. 4)."

Conkling's Admiralty, p. 280:

"Contracts of this nature, however, are not held obli-
"gatory by courts of admiralty upon the owners of the
"property saved, *unless it clearly appears* that no advan-
"tage was taken of their situation, *and that the rate of*
"*compensation is just and reasonable.* In that case the
"stipulated rate of allowance will generally be adopted
"and enforced by the Court as just and conscientious."

(1.) The Rule of the Circuit and District Courts.

The prevailing rule in the District and Circuit Courts has been to hold that agreements for salvage are not binding upon the owner of the property saved, unless the Court can clearly see (1) that no advantage has been taken of the parties' situation, *and* (2) that the rule of compensation agreed upon is just and reasonable for the services rendered.

In 1799, Judge Bee held that agreements entered into at sea, by persons in distress, were void, and that compensation for salvage must be reasonable and such as the Court could sanction (The *Ship Nancy*, Bee, 139; The *Brothers*, Bee, 136).

The case of the *Jenny Lind* (Newberry, 443), was a stranding in the Mississippi River. An agreement was made for the removal of the vessel and her cargo for a stated sum. Judge McCaleb found that the amount was excessive and exorbitant, and setting the contract aside, awarded a salvage compensation. In announcing the principles that guided his action he said (p. 447):

"But while I am clear in the opinion that I have no power to refuse to exercise a jurisdiction, which has been so fully and unequivocally conferred, and while I am satisfied from the evidence that the services performed by the salvors in this case are of a highly meritorious character, I am yet constrained to differ very materially from the view taken by the captain of the *Hungarian* in his estimate of the value of those services. *Such contracts* as the one which he thought proper to execute, in favor of the libelant (Williams), *will be recognized no further in a court of admiralty charged with a case of salvage, than they accord with its own equitable discretion in filing the quantum of compensation. It would be absurd to call upon this Court to enforce the specific performance of such contracts.* They may, and often do, form a fair and equitable criterion in awarding compensation for salvage services, if those services have been rendered under circumstances which show that the parties have voluntarily, and without any controlling necessity, on the side of the proprietors of the property saved, or their agents, entered into a contract for a fixed compensation, or upon the ordinary terms of a compensation for labor and services *quantum queruent*, in either case it does not alter the nature of the service, but only fixes the rule by which the Court is to be governed in awarding the compensation. It is still a salvage contract and a salvage compensation. But *contracts made for salvage services are not held obligatory by a court of admiralty upon the persons whose property is saved, unless the Court can clearly see that no advantage is taken of the situation of the parties, and that the rate of compensation is just and reasonable.* The doctrine is founded upon principles of sound public policy, as well as upon just views of moral obligation. And it has been remarked with equal justice and elegance, that no system

of jurisprudence, purporting to be founded upon moral or religious, or even rational principles, could tolerate for a moment the doctrine, that a salvor might avail himself of the calamities of others, to force upon them a contract, unjust, oppressive and exorbitant; that he might turn the price of safety to the price of ruin; that he might turn an act, demanded by Christian and public duty, into a traffic of profit which would outrage human feelings and disgrace human justice (*The Schooner Emulous*, 1 *Sumner*, 210)."

The appellants endeavor to create the impression that Mr. Justice Story favored the enforcement of salvage agreements with a certain degree of strictness.

The case of *Bearse* v. *Pigs of Copper* (1 Story, 314) has been referred to. It was a case involving but a small amount. It concerned the salvage of certain pigs of copper which formed part of the cargo of a schooner stranded on Pollock Rip, and which had afterwards broken up. Judge Story expressly said:

"There is not, in my judgment, any ground to assert that any fixed or definite contract for the service existed between the parties."

The statement quoted in the appellants' brief (p. 59) was purely a dictum, and was based upon the very special circstances of the case, and upon the statement of the Court that the copper had been under water some time; that there was no controlling necessity requiring immediate relief, nor any expense or hazard, and no duty on the part of the salvors to render the service, and there was abundant opportunity on the part of the owners of the salved property to obtain other assistance—elements all of which exist *e converso* in the case at bar.

Judge Story's views on this subject are more fully set forth in the case of the *Emulous*, 1 Sumner, 207. This was a case of stranding on Nashuan Island, in Vineyard Sound. She was subsequently floated off and brought into the harbor of Edgartown for repairs. In the course of his decision, Mr. Justice Story said:

"I take it to be very clear that wherever the service has been rendered in saving property on the sea, or wrecked on the coast of the sea, the service is, in the

sense of the maritime law, a salvage service. If it has been rendered under circumstances which establish that the parties have voluntarily and without any controlling necessity on the side of the proprietors of the property saved, or their agents, entered into a contract for a fixed compensation, or upon the ordinary terms of a compensation for labor and services *quantum meruerunt;* in either case it does not alter the nature of the service as a salvage service, but only fixes the rule by which the Court is to be governed in awarding the compensation. It is still a salvage contract and a salvage compensation. *It is true, that contracts made for salvage services are not ordinarily held obligatory by the Court of Admiralty upon the person whose property is saved, unless the Court can clearly see that no advantage is taken of the parties' situation, and that the rate of compensation is just and reasonable.* The doctrine is founded upon principles of sound public policy, as well as upon just views of moral obligation. No system of jurisprudence, purporting to be founded upon moral or religious, or even rational principles, could tolerate for a moment the doctrine that a salvor might avail himself of the calamities of others to force upon them a contract unjust, oppressive and exhorbitant; that he might turn the price of safety into the price of ruin; that he might turn an act demanded by Christian and public duty into a traffic of profit which would outrage human feelings and disgrace human justice."

The *Ellen Holgate* (8 Fed. Cas., 509), was the case of a schooner sunk in shoal water in the Delaware Bay, near Reedy Island, in consequence of a collision. She was salved by two tugboats under an agreement with the master to pay $2,000 upon her delivery at Philadelphia. Bradford, *J.*, in announcing the principles upon which his judgment proceeded, said (p. 510):

" As this was especially a salvage service, there must be a reward measured by the rules that apply to salvage cases, and *no contract can be permitted to stand which would compensate the salvors to a great degree more than they would be entitled to for a salvage service were there no contract;* but when it does appear that the contract was entered into fairly without any commission or taking undue advantage to make an unconscionable bargain, and in point of fact, in the judgment of the Court, the *price agreed to be paid did not much vary in amount from what*

the libelants would have been entitled to for a salvage reward, then in our judgment the contract should not be disturbed."

At page 512, the Court further said:

"If the $2,000 claimed as due under the contract exceeds in any considerable degree what the Court would have awarded without such contract, as a salvage service, then the contract should be set aside. If not it will be sustained; *so that the question really is, what are the tugs entitled to as a salvage reward?*"

The Judge then proceeded to consider the peril of the rescuing vessel, the risk to the salvors and to their property; their equipment for the service on which they entered; the duration of the service; the skill and energy employed, and the work they left to perform it, and reached the conclusion, upon the merits, that the amount agreed to be paid was reasonable compensation for what the salvors actually did. The contract sum of $2,000 was awarded, with an allowance of $70 additional for the salvors' outlays.

In the *A. D. Patchin*, 1 Blatchford, 414, an agreement was made between the captain of a steamer and the owner of a stranded vessel, that the former should render such salvage services as might be necessary, at the rate of $450 per day. The Circuit Court affirmed a salvage award of the District Court, equal to the stipulated amount, Mr. Justice Nelson remarking:

"That contract was not necessarily binding upon the vessel in peril, or upon her owner; and it would have been the duty of the Court to have disregarded it altogether, and to have awarded a rate of compensation according to the principles of admiralty in salvage cases, if any advantage had been taken by the libelant in fixing the rate in the agreement. The rate thus fixed is looked at in determining the amount proper to be awarded for the salvage service; but would be disregarded, *if disproportionate and unreasonable, or if extorted through the pressure of impending calamity.*"

In the *J. G. Paint*, 1 Benedict, 545, Mr. Justice Blatchford, then District Judge, had before him a case of an

agreement of salvage service, and dealt with it as follows (p. 550):

"It is well settled that courts of admiralty will not allow a salvor to take advantage of his situation, and to avail himself of the calamities of others to drive a bargain; but yet they will enforce a contract made for salvage service and salvage compensation, where the salvor has not taken advantage of his power to make an unreasonable bargain. *Post* v. *Jones*, 19 How. (60 U. S.), 160; The *Emulous* (Case No. 4,480); The *A. D. Patchin* (*Id.*, 87).

"After a careful consideration of all the facts in this case, I am unable to come to the conclusion that the sum agreed upon, $3,000, is an unreasonable compensation *for the service rendered*, or that the agreement to pay it was made under such circumstances that the sum fixed by the agreement ought not to be taken as the measure of the salvage compensation."

The steamer *Adirondack*, of 1,502 tons register, bound from New York to Liverpool, with a cargo of cotton, grain and salt beef, and valued, with her cargo, at $300,000, broke her low pressure piston, entirely disabling her machinery for the time being. It would have been practicable, in two or three days, with the appliances on board, to get the ship under steam with the use of the remaining engine. While in latitude 59° 44″ west, about 450 miles off Halifax, the nearest port, and 662 miles from New York, she was taken in tow by the steamer *Plainmeller*, under a written agreement to pay £4,000 for towage to New York. This agreement was made only after the captain of the *Adirondack* had attempted unsuccessfully to obtain a lower price. It was held that the contract was unjust, and made by parties not upon equal terms; that it should be set aside and a decree entered for $7,500, the amount of a tender deposited in court by the claimant.

Choate, *J.*, said:

"Upon these facts, I think there can be no question that the sum demanded by the captain of the *Plainmeller*, and finally assented to by the captain of the *Adirondack* (£4,000), was very largely *in excess of that liberal compensation which courts of admiralty award for* SIMILAR SERVICES, and that the amount tendered, which is a little more than £1,500, is fully up to the measure of salvage

award which any court of admiralty would give for the service rendered.

"The *Adirondack* was in no present peril. She was temporarily disabled in her machinery, but unless overtaken by very tempestuous weather, her machinery could have been soon repaired so that she could proceed on her voyage. Her cargo was not perishable. There is no proof that the broken machinery endangered the safety of the ship. She was otherwise sound and able to keep the sea for an indefinite time. The place where she was was the open ocean, with no risk of going ashore. She had no passengers. * * * In respect to the special contract for £4,000 in this case, it must be held that it was unjust and unreasonable in amount. *While there is no charge of fraudulent practice by which the agreement upon this sum was procured, there is evidence enough that the agreement was improvident and entered into without much consideration of the proper elements of a salvage award.*

"The contract recites that the *Adirondack* was totally disabled as to her machinery. This was true as to her temporary disability, but misleading as a statement of absolute disability. The captain of the *Plainmeller* insisted on his own terms and made the agreement of them a condition of rendering any assistance. I think he took advantage of the situation of Captain Robert to exact from his circumstances of present distress an exorbitant and grossly excessive amount. *The master of the Adirondack was inexperienced.. This was his first voyage as master.* He knew little or nothing of machinery, and seems not entirely to have relied on what his engineer told him as to their ability to repair and go on under steam. His judgment was overborne by the pressure of the circumstances in which he was placed, to that degree which fully *justifies a court of admiralty in relieving the owners of his ship from the inequitable bargain into which he improvidently entered.*"

The *Adirondack*, 2 Fep. Reb., 387.

A canal-boat, loaded with coal, sank in the Kill Von Kull and the master made a written contract with the libelant to award him 60 per cent. of the value of the cargo (which would amount to some $900) for his services in raising it.

In an action setting up the contract, and praying for such salvage award as might be just, the contract was disregarded and $250 awarded.

Benedict, *J.*, said:

"Agreements to pay for salvage services, made by masters of canal-boats, when within easy reach of all parties interested in the property to be saved, are subject to be closely scrutinized, and will not be upheld in a court of admiralty when it appears that the price agreed on by the master is unreasonable or exorbitant."

202 *Tons of Coal*, 7 Benedict, 343.

A schooner lying at a pier on the other side of which a vessel was burning, was hauled out into the stream by a tug, under an agreement by the mate in charge to pay $500. The libel was based upon the contract.

Benedict, *J.* (p. 180), said:

"The contract upon which the libelant relies was entered into when the vessel was actually in no great peril for the weight of the evidence is that steam fire engines were upon the dock, which proved able to prevent the dock shed from catching fire, and which were able to have preserved the schooner, even if the shed had caught fire. There was, nevertheless, apparent peril, sufficient to affect the judgment of the mate in charge and to justify a desire to move the schooner. * * * For such a service, the demand of $500 appears to me exorbitant. The circumstances did not justify the making of such a demand, nor the acquiescence in it by the mate. The amount should be reduced to $100."

The *Jacob E. Ridgway*, 8 Benedict, 179.

A tug, having a brig in tow for the harbor of New York, carelessly ran her aground on the Romer Shoal inside Sandy Hook and was unable to pull her off; but the next morning, another tug coming to the spot, the master of the brig made an agreement to be towed off for $2,500, and the two tugs got the brig off. *Held*, upon a libel for salvage, that the agreement was exorbitant, and that the $1,250 was a sufficient compensation for the service, of which sum the second tug was entitled to one-half, but the other tug, having been the cause of the disaster, was not allowed anything.

The *Homely*, 8 Benedict, 495.

In the *Sophia Hanson*, 16 Fed. Rep., 144, Benedict, *J.*, said:

"If this action was based upon a contract made between the master of the schooner that grounded on the West Bank in the Lower Bay of New York harbor, and the tug that pulled her off, as a contract for towage, the libelant could not recover for the reason that the Court would not enforce an agreement to pay $1,000 for a few hours of ordinary towage service, such an agreement being clearly unconscionable. But the action is not based upon contract. The claim rests upon a salvage service performed. *In such an action the agreement of the master to pay* $1,000 *for the service is by no means conclusive on the question of the amount of salvage to be awarded* * * * That service consisted simply in pulling the schooner off the West Bank where she had grounded on an ebb tide, having missed stays. * * * I consider $500 to be a liberal salvage compensation."

In the *Young America*, 20 Fed. R., 926, a libel was filed for a salvage service, which consisted in towing a ship away from the neighborhood of fire, where she was in apparent, though not in real, danger, under a contract to pay $1,000 for the service. It was held that the contract could not be enforced, and $300 was awarded. Nixon, *J.*, said:

"Contracts of this nature entered into the midst of excitement are justly regarded by the Court with suspicion, especially when they are of such an unconscionable character. Neither the Waite and Young America was subjected to any peril which authorized the demand for the agreement to pay any such sum for a service without risk and of such short duration."

The case of the *R. D. Bibber*, 33 Fed. Rep., 55, decided on appeal in Circuit Court for this circuit in 1887, is not in point for the appellees. The Court, in that case, expressly found that the 50 per cent. stipulated in the contract for the salvage of a vessel laden with railroad iron, where the vessel had been abandoned, *was not in excess of the usual cost of salvage of a vessel with such a cargo on that coast; and that the amount was reasonable*, and "does not exceed to any great extent the actual cost for

work and labor to salve wrecked railroad iron." It was also found that the vessel and cargo were saved at the risk of serious damage to the property engaged in the work of salvage, one of the lighters being injured, and the crew suffering much hardship. The service was principally lighterage service. Pardee, Circuit Judge, distinguishing the case of the *Hesper*, 18 Fed. Rep., 672, said:

"The *Hesper* was a steamship aground in fair weather, under the control of her master and crew, who did not abandon her to salvors, and the services rendered her were at the procurement of her agents. The salvage of the *Hesper* was due as much to her machinery and her master and crew as to the services of the lighters and tugs called to her aid."

In the *H. D. Bacon*, Newb., 279, on which appellants also rely (Brief, p. 59), Judge Wells concluded his opinion with an express finding that the amount stipulated for in the agreement was just and reasonable for the services rendered.

A ship valued at $25,000, laden with a cargo of sugar worth $50,000, and drawing 14½ feet of water, went aground upon a rocky ridge, extending obliquely under her, from the starboard quarter nearly to the port bow, upon which there were but 12 feet of water. Under a written contract, which was attached to the libel, by which the master, being unable to obtain a better offer, agreed to pay $10,000 for getting his vessel afloat, she was hauled off after 20 hours' work by means of a partial discharge into schooners, and by heaving upon a large hawser made fast to an anchor. The contract was set aside and an award made of $7,875. LOCKE, *J.*, said:

"The contract which was made between the master and the salvors can have no binding force upon the owners, *as although probably no especial force or influence was brought to bear upon the master, yet the position in which the property in his charge was placed and the necessity of immediate action compelling the contract, is recognized in admiralty law.* It certainly cannot be said that no advantage was taken of the master on account of the position in which his vessel was placed, as that position was the very foundation of the contract. It was

not a voluntary contract on his part. * * * If, from any mistaken idea in regard to the delays and expenses of the Court, he desired to make a bargain rather than to submit to a judicial decision, he was, nevertheless, from the surrounding circumstances, forced to make one that his unbiased judgment would not have approved, had it not been for the position in which he was placed. It was out of his power to obtain assistance in any other way. There were no competing bidders for work, and he was compelled to make the best bargain he could, no matter how inequitable it might be."

The Court thereupon awarded $7,875, together with costs, charges and expenses to be taxed.

The *Tennasserim*, 47 Fed. Rep., 119.

The steamer *Sirius*, valued with cargo and freight at $143,539, was lying at anchor in a disabled condition, near an island off Lower California, in a situation which would be dangerous if a storm arose, and was towed 320 miles to port by the *Tillamook*, under a contract for $20,000. The master of the *Tillamook* would not help for less, but offered, in the alternative, to furnish stores and to take an officer gratuitously to San Diego for assistance, but the master of the *Sirius* was unwilling to take the risk of a storm arising in the meantime.

The libel was based upon the contract.

The towage service was rendered by the tug without difficulty or danger, and was completed in fair weather.

Gilbert, Circuit Judge, who delivered the opinion of the Court (p. 857), said:

"Should the contract, made, as it was, under these circumstances, be enforced? The law applicable to the subject is well expressed in the decision of the Supreme Court in *Post* v. *Jones*, 19 How., 158:

" 'Courts of admirality will enforce contracts made for salvage service and salvage compensation where the salvor has not taken advantage of his power to make an unreasonable bargain; but they will not tolerate the doctrine that a salvor can take advantage of his situation, and avail himself of the calamities of others, to drive a bargain; nor will they permit the performance of a public duty to be turned into a traffic or profit. The general interests of commerce will be much better promoted by re-

quiring the salvor to trust for compensation to the liberal recompense usually awarded by courts for such services.'

"The doctrine thus declared early in the history of the the Court has been affirmed in more recent decisions. In the case of the *Tornado*, 109 U. S., 117; 3 Sup. Ct. Rep., 78, the Court said:

" 'Every agreement for salvage compensation is subject, as to amount, to the judgment of the Court as to its being equitable, and conformable to the merits of the case.'

"There can be no question that the service rendered by the *Tillamook* was a salvage service, and not one of mere towage. This is distinctly alleged in the libel. The averments are that the *Sirius* was in an entirely helpless and disabled condition in consequence of the breaking of her shaft and the loss of her propeller, and that her sails were not sufficient to keep her head to the sea, or to prevent her from drifting with the currents, and that, had it not been for the assistance so rendered her, she and her cargo and the lives of all on board would have been in danger of being lost. The evidence sustains these averments. It is equally clear that the price charged by the Tillamook was an exorbitant one. She was put to little inconvenience or expense. She deviated but little from the course of her regular voyage, and it is not shown that she thereby suffered loss of other business. * * *

"In our view of the facts, therefore, the master of the *Tillamook* took an unfair advantage of his power and made an inequitable bargain not conformable to the merits of the case, and the towage contract should not be enforced. * * * In our opinion a liberal recompense to the *Tillamook* for the salvage service rendered in this case would be the sum of $8.000."

The *Sirius*, 15 U. S. App., 191 Circuit Court Court of Appeals, Ninth Circuit; Reversing the *Sirius*, 53 Fed. R., 611.

The case of the *Wellington*, 52 Fed., 605, on which the appellants rely (Brief, p. 61), is distinguishable from the present in a number of its essential facts. (1) The disabled vessel which had lost her propeller blades, and drifted near the mouth of the Columbia River, was in communication with a steamer which offered to tow her to safe anchorage near the Columbia River, which offer was declined, apparently upon the ground that the master wanted to make San Francisco. (2) Having been offered a tow to a safe an-

chorage in the Columbia River, the captain declined it, and hailed the steamer Montserrat bound for San Francisco, with a cargo of coal, and desired to be taken to that port. The Montserrat was not fitted for towage services, and neither vessel had proper towing lines. The sum of $15,000 was agreed upon for the towage. (3) The towage was for a long distance, and the values large, and there was no such disparity between the amount agreed upon for compensation, and that which the Court would have awarded irrespective of the contract.

The case was distinguished upon the above grounds by the Court of Appeals of the Ninth Circuit, in the *Sirius*, 15 U. S. App., 191.

In *The Don Carlos*, 47 Fed., 746, a barque worth $15,000 with a cargo and freight worth $38,000, stranded on South Beach, near the entrance of the Bay of San Francisco. News of the stranding was telephoned to San Francisco, and the libelant's tug was immediately sent to the rescue. At her arrival there was a rolling swell, sufficient, combined with the ebb tide, to swing the barque broadside to the shore, when it was reasonably certain that she would soon become so banked with sand as to render her removal impossible. The evidence showed that other like vessels, stranded at or near the same place, with two exceptions, had been lost. The captain of the tug refused to render assistance, except on the master's agreement to pay $8,000, which, after trying to obtain better terms, he agreed to do. The tug at once began pulling, and prevented the barque from swinging. Two other powerful tugs soon arrived, and the master of the barque agreed to pay $2,000 additional for their assistance. In about two hours and a half they succeeded in pulling the ship off. She was then towed into the bay and put aground on the Mud Flats. None of the tugs was in any danger Held that the demand for $8,000 for the services of the tug was exorbitant, and would not be enforced.

Ross, *J.* (p. 748) said:

"The perplexing question is, what is a just award to be made the libelants, in view of all the circumstances of the

case? *I do not think the amount of the contract for the services of The Alert* ($8,000) *is an equitable criterion by*

Addendum.

Brief for the *Elfrida*, p. 31.

With reference to the remark of Brown, *J.*, in the *Schiedam*, 48 Fed., 923 (quoted on the brief for the Elfrida, p. 31), that "*viewed as a reward, salvage is not properly a subject of any binding contract in advance,*" the attention of the Court is respectfully called to the definition of salvage by Mr. Justice Bradley, in the case of the *Suliote*, 5 Fed., 99, 102:

"Salvage should be regarded in the light of compensation and reward, and not in the light of prize. The latter is more like a gift of fortune conferred without regard to the loss or sufferings of the owner, who is a public enemy, whilst salvage is the reward granted for saving the property of the unfortunate, and should not exceed what is necessary to insure the most prompt, energetic and daring effort of those who have it in their power to furnish aid and succor. Anything beyond that would be foreign to the principles and purposes of salvage; anything short of it would not secure its objects. The courts should be liberal, but not extravagant; otherwise, that which is intended as an encouragement to rescue property from destruction may become a temptation to subject it to peril."

Regarding salvage compensation not only as an award for services performed, but also as a reward based upon principles of public policy and commercial interest, it cannot properly be the subject of a binding contract in advance to be specifically enforced by a Court of Admiralty. A contract for a reward is a contradiction in terms.

sum agreed on in advance and in the presence of danger may, therefore, limit the salvor, it has little or no binding effect upon the other party. *All courts of ad-*

case? *I do not think the amount of the contract for the services of The Alert* ($8,000) *is an equitable criterion by which to fix the compensation for her services.* The tug came promptly, it is true, and she took on board from the life boat, a man, woman and child, all of whom had been taken from the barque by the life-boat. But their lives were not in danger, nor was the tug in danger. There was but little wind, and she had plenty of water in which to move. In no respect that I can see, did she take any particular risk in undertaking the service. The barque was in great danger of swinging round broadside to the beach, and of being so banked in with sand as to render it impossible to pull her off; but for the captain of the Alert to demand $8,000 for making fast to and pulling on her, under the circumstances of the case, was, in my opinion, exorbitant; and, that being so, his refusal to render the barque any assistance until the master agreed to pay him that sum, renders it proper for the Court to disregard the master's consent to do so."

The Court examined all the circumstances and awarded $5,500 for all three tugs, with an additional $225 for the services of one of the tugs in standing by during the night after the *Don Carlos* was brought into port.

In The *Schiedam* (48 Fed., 923), Judge Brown most admirably stated the rule on this subject:

"The compensation awarded in a court of admiralty for salvage services is not given as a mere *quantum meruit* for the work and labor done, but on grounds of public policy, in the interest of navigation and for the safety of property and life, and as an encouragement and reward for the readiness, promptitude and energy necessary to secure those ends, both in the conduct of the salvors personally and for the vessels and other appliances previously provided for such service. *Viewed as a reward, therefore, salvage is not properly a subject of any binding contract in advance,* except as a limitation of the salvor's demands. In cases of present distress and peril, *the very necessity for salvage services presupposes that the parties do not stand upon equal terms as respects any contract they may make on the subject* any more than a captured prisoner in stipulating with brigands for his ransom While a sum agreed on in advance and in the presence of danger may, therefore, limit the salvor, it has little or no binding effect upon the other party. *All courts of ad-*

miralty freely examine into the circumstances in the interest of the latter, and award no more than a reasonable sum without regard to the amount agreed on. See *Chapman v. Engines, etc.*, 38 Fed., 671, 672 and cases there cited."

In *Chapman v. The Engines of the Greenpoint*, 38 Fed., 671, 672, to which reference was thus made, Judge Brown had held:

"Agreements between the parties fixing a definite sum to be paid for services of a salvage nature are treated as attempts merely to regulate the amount of compensation not otherwise affecting the nature of the contract or the right to a lien if successful. Such agreements are very common and *are upheld by courts of admiralty if reasonable in amount;* if oppressive or extortionate, they are disregarded."

The *G. W. Jones*, 48 Fed., 925, holds the exact contrary of the point for which it is cited by the appellant (Brief, pp. 56-57). The contract was for $2,500. The Court on the facts before it, failed to find any compulsion in the making of the contract (p. 926), but concluded it was for a somewhat excessive compensation, and *reduced the sum to be paid* to $2,000. Brown, *J.*, said (p. 926):

"Although the answer does not deny the value of the services, yet a court of admiralty would not enforce a contract of this nature, either against the owners or against their property in a suit *in rem*, any further than it appeared to be reasonable (the *Adirondack*, 2 Fed., 387; the *Hesper*, 18 Fed., 692; the *M. B. Stetson*, 1 Low., 119; the *John Ritson*, 35 Fed., 663; the *Schiedam*, 48 Fed., 923) * * * I think that as no such injury [to the tug] was received, and the service was comparatively short, $2,000 will be sufficiently liberal compensation and a proper one in the present case."

The *Alert*, 56 F., 720, upon which the appellants greatly rely (Brief, pp. 49-50), does not support their contentions. It was the case of a contract made in New York, under which a salvage expedition was sent out to Barranquilla, South America, to salve a vessel stranded near that port. The agreement was made by the shipowner's resident agents and the agent for underwriters on the hull, and

was the best that could be made with any salvage company capable of doing the work, that could be reached from that business centre. The case did not involve any issue of compulsion or of unreasonableness. The ground on which the contract was resisted, was alleged mutual mistake as to the values at risk. The salvors had to send their plant —— miles to reach the wreck. It was problematical whether anything would be left to salve by the time they got there. The sending of the expedition was attended with heavy expense. On all the facts the Court found in substance that the contract provided only a reasonable compensation for what was done. This is shown by the fact that, *although the contract did not bind the cargo, the Court awarded the same rate of compensation for salving it, as was provided in the contract for salving the ship* (pp. 726, 727).

In the course of his opinion Judge Brown restated the principles on which he has always acted, as follows (p. 724):

" Where the subject of the contract is a salvage service the Court under the law applicable to that special head of jurisdiction, *may inquire into all the circumstances of the salvage contract, including its reasonableness and fairness;* and in doing this it must take note of the fact of a mutual mistake, if that is proved to exist, and award only such compensation as justice and equity may permit. *The right and the duty of a Court of Admiralty to examine into the fairness and reasonableness of every salvage contract whenever its fairness is challenged have been repeatedly asserted by the Supreme Court; and such has been the uniform practice in this district as well as others.*"

Judge Pardee seemed to feel the pinch of a *dictum* by Judge Locke, in which he had concurred, in the case of the *Agnes I. Grace* (2 U. S. App., 317), where the Court said;

" Before the performance of the service, the agreement appears to have been considered by all fair and just, and if so, then it cannot now be considered otherwise, because of its successful rendition by the appellees, who had assumed all expense and risk. Although the amount given may, under the circumstances, appear high in proportion

to the value of the property saved, this Court does not deem it sufficiently unreasonable to disturb the judgment of the Court below."

The *dictum*, we submit with all deference, squints at a rule contrary to that sanctioned by the great weight of authority. But if it be deemed correct, it had no just application to the case in hand, as will appear from a comparison of the two cases. The *Grace* was a wooden schooner, with a hole in her bottom, and the water rising and falling inside of her with the rise and fall of the tide, while the *Elfrida* was a staunch iron steamer, wholly undamaged. The schooner was lying where at low tide she was more than *two miles* from water sufficient to float her, while the steamer had not crossed any bar, and with a rise of tide of only 3 feet, was floated by being hauled a thousand feet. The schooner, having no propeller or winches or steam pump, was without the means of helping herself or of aiding the salvors to get her off, while *Elfrida*, with the aid only of three of the salvors' anchors, hauled herself off with her own power. The schooner was without adequate pumps; the *Elfrida* not only was well supplied with pumps, but had a double bottom and tanks extending from stem to stern. The schooner was imbedded from two and a half to three feet in the sand; the steamer, with her water ballast pumped out, probably about six inches, if not wholly free at the stern. The schooner was exposed to the storms of the Atlantic coast, in imminent peril from any wind from the northeast to southeast; the steamer was protected by the jetty from any wind more northerly than southeast, and was lying on a far less dangerous coast. On the one hand, the amount awarded was found to have been a moderate compensation for the service performed; there is no contention in the present case that the amount awarded was moderate or reasonable, apart from the contract.

Judge Speer, who decided the *Grace* case in the District Court, had expressly found that the *contract provided for no more than a reasonable compensation* (2 U. S. App., 332). In dealing with the force and effect of the salvage

agreement he had expressed the correct doctrine on the subject as follows (2 U. S. App., 322):

"It is true, as is insisted by the respondents' counsel, that a contract of this character is not binding upon the Court, and that in all cases of salvage it is competent for the Court to adjudge and assess the amount of the recovery in accordance with the equities of the case, and, if it should appear that a contract of this character was an inequitable one, the Court would, of course, disregard it. But, whenever a contract has been entered into after due deliberation by the parties, and has not been shown to be in any respect an inequitable one, it is exceedingly valuable as evidence to enable the Court to arrive at a just determination. The Court regards this contract *as evidence* in that light, and not as a conclusive contract; but it is a most significant and valuable indication of what should be the true amount of the recovery."

The conflict between the rules laid down in the *Grace* case, and in the present, is more fanciful than real. In the former, the opinion concluded by saying "this Court does not deem it [contract] *sufficiently* unreasonable" to warrant setting it aside. This concedes the principle that a Court of Admiralty may refuse to enforce an agreement if the unreasonableness in the amount is "sufficient." Judge Pardee's dissent in this case (Rec., p. 276) makes the same concession: "I am clearly of opinion that the amount agreed upon is *not excessive to any such extent* as to be unreasonable." This leaves nothing really at issue between the two opinions, but the inquiry: To what extent must an agreement be excessive in order to make it unreasonable? The answer to that inquiry necessarily calls for an examination of the facts, to see what amount would be due as a pure salvage compensation. Comparison of that amount with the sum stipulated for, and that alone, will show the excess. In the case at bar it was found by the majority that $10,000 would be an ample compensation. This showed the agreement was excessive to the extent of $12,000. Was not that excessive "to such an extent as to be unreasonable"? Judge Pardee's opinion is inconclusive, in that though admitting some excess, he holds it was not unreasonable, but omits to state his con-

clusion as to what would be a fair reward, or how great the excess must be to be unreasonable. When the matter is thus boiled down, it seems that the difference between the majority and the minority was really one *of fact*, and not of law. The opinion of the Court found that exorbitancy existed; the dissenting Judge did not. Having found the exorbitancy, the Court were in accord with the great weight of American authority, in declining to enforce the agreement. They were also in accord with the English cases, as we shall now endeavor to show:

(5.) THE ENGLISH RULE.

Quotation has previously been made (*ante*, p. 17), from the case of The *Helen and George*, Swabey, 368, 369, which was cited with approval in The *Tornado*, 109 U. S., 110.

In the *Henry*, 15 Jurist., 183, Dr. Lushington again stated the rule:

"Where agreements are made at sea between salvors and masters of vessels, the Court will always be very desirous to confirm them, if it can do so consistently with equity and justice. The Court would be very reluctant, under ordinary circumstances, to disturb an agreement made between parties, on account of the same appearing too large or too small, *but I do not say that there are not cases in which I should not hesitate for a single moment to pronounce against an agreement, either on the one ground or on the other.*"

In the *Theodore*, Swabey, 357, where nothing more was charged or proved than that the master had "improperly and recklessly" agreed to an altogether excessive payment for a service of little difficulty rendered to a vessel in little danger—towing her off a bar—Dr. Lushington, in declining to enforce the contract, said (p. 352):

"I regret to say on the present occasion—for the Court is generally anxious to protect the interests of salvors—that it is *an exorbitant demand*, and such as no court of justice would be justified in carrying into effect."

Perhaps the clearest statement of the English rule was made by Lord Esher (then Lord Justice Brett) in *Akerblom* v. *Price*, 7 Q. B. D., 129, 132:

"The fundamental rule of administration of maritime law in all courts of maritime jurisdiction is that, whenever the Court is called upon to decide between contending parties, upon claims arising with regard to the infinite number of marine casualties, which are generally of so urgent a character that the parties cannot be truly said to be on equal terms as to any agreement they may make with regard to them, the Court will try to discover what, in the widest sense of the terms, is, under the circumstances of the particular case, fair and just between the parties. If the parties have made no agreement, the Court will decide primarily what is fair and just. * * * If the parties have made an agreement, the Court will enforce it, unless it be manifestly unfair and unjust; but if it be manifestly unfair and unjust, the Court will disregard it, and decree what is fair and just. That is the great fundamental rule."

In *The Mark Lane*, 15 Prob. Div., 135, Butt, *J.* (p. 136), stated the rule thus:

"The plaintiffs are seeking to recover the sum of £5,000 as due to them by agreement, and not, as is usually the case, asking the Court to award such an amount of salvage as it may deem just. I feel satisfied that for services such as those rendered in this case, the Court of Admiralty never has given such an award as £5,000, and I think, having regard to the state of the *Mark Lane*, the distance she was towed, and that £5,000 is more than one fifth of the total value of the salved property, the plaintiffs' demand is exorbitant. * * * I have said that I consider the demand exorbitant. In the cases referred to by counsel, the word 'inequitable' has been used. But I think that what is at the root of the question is this—where it is found that a wholly unreasonable price has been insisted upon by the salvors, and an agreement incorporating it has been signed, the Court looks rather to the position of the parties than to the reasonableness or unreasonableness of the amount. *Were the parties, in fact, contracting on equal terms? It is clear that in the present case they were not. It is true that there is not in this case, the amount of duress which would invalidate an agreement at common law; but in this Court the same amount of compulsion or duress—call it what you will—is not necessary*

to induce the Court to refuse to enforce an agreement. The captain of the *Crete* appears to have said, though not in so many words, 'If you do not sign this agreement to pay £5,000, I will leave you.' His manner and demeanor were such that they led the captain of the *Mark Lane* to believe that that was what he meant to do, and he has not from first to last said that he would either have taken less or have stayed by the *Mark Lane*. The fact is that the master of the *Mark Lane* signed this agreement under compulsion, and, *the amount being exorbitant*, I decline to uphold the agreement."

The Court thereupon considered the merits of the service, and awarded £3,000.

In the *Rialto* (1891) Prob. 175, a steamship of that name was towed by the *Coomassie* to Falmouth; the master of the *Coomassie* insisted on a contract for £6,000, which was signed. The towage lasted three days, and was for a distance of about 430 miles. Butt, *J.*, declined to enforce the contract, but awarded £3,000 salvage, and in the course of his opinion (p. 178), said:

"It has been laid down that the sort of pressure requisite to invalidate an agreement of this nature, and made in such circumstances, is less than the duress required at common law to invalidate an agreement, and the question is: What amount of duress will have that effect? Again, the effect of the decided cases is to show that the agreement insisted upon by the salvors at the time must be inequitable; and then comes the question: What is an inequitable agreement in cases of this sort? On this point, two ingredients are commonly referred to. First, the parties contracting must be shown not to have contracted on equal terms. I am inclined to think that, in general, in the case of salvage services contracted for and about to be performed, the parties are on unequal terms, and, therefore, the mere fact of their standing in such a position will not invalidate the agreement. If, however, contracting on unequal terms—that is to say, the master of the salved ship being at a disadvantage—it further appears that the sum insisted upon is exorbitant, then the two ingredients exist which will induce the Court not to uphold the agreement. Now, I have no doubt that the parties stood, as they usually do in such cases, upon unequal terms. The question that follows is: Is £6,000 a wholly unreasonable, or, in other words, an exorbitant sum? I think it is, and, there-

fore, it seems to me that the two things necessary to invalidate the agreement exist here. That being so, and that being a matter entirely for me, the next question is: What amount should the salvors receive? That depends on the usual considerations applicable to cases of this sort."

[The learned Judge then dealt with the evidence as to the nature of the towage, viz., the large size of the two vessels, the risk always attending the manœuvering to get into position to tow a disabled vessel, the rope actually getting round the propeller of the salving vessel, the weather during the towage, the time occupied in towing, and the distance towed, and continued:]

"My opinion, after consulting the Elder Brethren, is that the proper award would be £3,000."

In the *Kingalock*, *Spink's Reports*, 263, 265, a brig, disabled at sea, made a contract for towage to London, for £40. During the service, the master of the tug discovered that the brig had been very seriously damaged, which fact had not been transmitted to him. It was held that the mere concealment of a fact which might operate on the service, and therefore on the agreement, vitiates it. The agreement was set aside, and *increased* compensation was awarded to the salvor.

The Court said (p. 265):

"An agreement to bind two parties must be made with a full knowledge of all the facts necessary to be known by both parties; and if any fact which, if known, could have any operation on the agreement about to be entered into is kept back, or not disclosed to either of the contracting parties, that would vitiate the agreement itself. It is not necessary, in order to vitiate an agreement, that there should be moral fraud; it is not necessary, in order to make it not binding, that one of the parties should keep back any fact or circumstance of importance, if there should be misapprehension, accidentally or by carelessness; we all know that there may be what, in the eye of the law, is termed equitable fraud. * * * I therefore come to the conclusion that, as it might affect the performance of the service, the agreement was null and void *ab initio*."

In the *Phantom*, L. R., 1 A. & E., 58, Dr. Lushington overruled an agreement, and *enlarged* the compensation of salvors, saying:

"There is another matter in all agreements where salvors are going to perform a duty—whether an agreement is just and equitable—because, if it is not, however much it has been agreed upon by both parties, the Court is in the habit of overruling such an agreement, if it is unjust and inequitable."

In Mr. Justice Kennedy's work on *The Law of Civil Salvage* (London, 1891), the English cases are summarized thus (p. 208):

"The duty of an admiralty court to set aside a salvage agreement for an excessive reward, where the salvor has been able practically to dictate his own terms, has been nowhere more powerfully stated than by Story, J., in The Emulous" (1 Sumn., 207, at pp. 210–211.) [Quoting the passage cited *ante*, p. 20.]

"It is not, however; it is submitted only where it is proved that there has been unfair dealing in the shape either of fraud or misrepresentation, or practical compulsion, that the Court will interfere with an agreement which fixes a grossly excessive remuneration. Evidence of any such unfair dealing greatly strengthens, of course, the case against the agreement, but even without such evidence, if it finds the exorbitancy to exist, however that exorbitancy originated, the Court will, alike on principle and on authority, be justified in setting aside the agreement.

"The propriety of disregarding an agreement, if the amount of the award appears to the Court to be inequitable, has, indeed, been recognized by the maritime law from very early times. [Quoting the passage from the Roll of Oleron, cited *ante*, p. 8].

(**6.**) Burden of Proof.

It is but natural, that as respects agreements made with a master who is under, or feels he is under, a controlling necessity to have immediate assistance, the courts should have this inequality of position constantly before their eyes, and should require him who sets up a salvage contract, to prove it was fairly obtained and is for a reason-

able amount. And such is the rule that is generally announced.

The headnote by Mr. Justice Curtis, to the case of the *North Carolina*, 15 Peters, 40, states the rule as follows:

"Though the master may compromise or refer the question of salvage, where he cannot consult his owners without injurious delay, yet his conduct will be closely scrutinized, and his contracts will not bind the owners, unless they appear to have been such as a discreet owner would have made in similar circumstances, and the burden is on those who set up his authority."

In the *British Empire*, 6 Jurist, 608, Dr. Lushington said:

"Now, the general principle, with respect to such agreements, I apprehend to be this, that it lies upon the party setting it up to prove two things, first, that such agreement was made, and secondly that it was just."

In The *Arthur*, 6 Law Times, N. S., 556, Dr. LUSHINGTON again laid down this principle:

"Most clearly the onus in causes of this description lies on those who set up the agreement, and they are bound to prove the agreement was made after consideration, and was fair and equitable."

It is implied, also, in many of the cases before referred to, where the courts have said, in substance, that contracts, made under the stress of assumed need for prompt service, would not be enforced "unless the Court can clearly see that no advantage is taken of the situation of the parties, and that the rate of compensation is just and reasonable."

(7.) SUMMARY.

The foregoing review of the authorities cited by both parties shows that no Court of Admiralty in this or any other country, so far as the counsel on either side of this controversy can find (except the District Court in the present case), has ever enforced a salvage contract that pro-

vided for an excessive or unreasonable compensation for the services that were rendered. Detached expressions may be found here and there in the opinions of judges, intimating that a certain degree of compulsion must also be found, or that the validity of the agreement should be viewed from this or that standpoint; but in every case where the excess was plain, the judges who felt that something else must also be found, found it. The excess is at the root of the whole matter and is sufficient in itself to vitiate every such contract. The notion that some compulsion must also be found to exist may have its origin in the erroneous impression, that this jurisdiction, in admiralty, was derived from the principles of equity. The *dictum* in the *H. D. Bacon*, *Newb.*, Adm., 279, is founded on that misapprehension. Compulsion, or inequality of position between the contracting parties, was presupposed in the judgment of Oleron, which decreed that "the justyce of the country ought well to regarde what payne and what labour they have done in saving them, and after that payne, notwithstanding that promise which the said mayster and the merchauntes shall have made, rewarde them." The thing which the "justyce" was enjoined to do, was to see that excessive compensation for services rendered should not be paid, even if promised, in the face of danger. Excess alone was, and under the best considered authorities, still is enough to justify and to require a court of admiralty to refuse its sanction to any agreement tainted with it.

It also appears that there is no difference, either in the cases or in the foreign codes, between the application of the rule to sea contracts and to those made in harbors, or on shore. It is applied wherever the contract is made during the danger. In some of the codes it is made to apply in terms to strandings; and in the *Tornado*, 109 U. S., 110, it seems to have been enforced in relation to a contract made in one of our largest ports. The place where the agreement is made, or the subject of it, is not so important, in the average case, as the unavoidable inequality of position between the contracting parties, so long as the danger to the property continues. However benevolent a court may be to salvors, it cannot wink so hard as not

to see that essential difference in the footing of the parties, so where excess in the contract is made to appear, that, of itself, is deemed sufficient to prevent its being enforced.

On the other hand, it is to be borne in mind that in any disposition which the court of admiralty makes of the case, the salvor will receive an ample and liberal compensation. The question is not, as at law, whether the recovery shall be for the contract sum or for nothing; but whether it shall be for the contract sum or for such other amount as the Court, bearing in mind the public policy involved, may think fit and proper. The courts are also less reluctant to disregard an agreement and to award a salvage compensation, because that of itself is always in excess of mere payment for work, labor and material, or for the services actually performed. Every salvage award carries with it a bounty for the encouragement of salvors, and to stimulate their efforts to the performance of similar services in the future. To offer a salvage compensation, therefore, as was done in the answer in this case, is not to make a niggardly offer of an inadequate reward, but is to tender the fullest payment, with a liberal bounty in addition. More than this, the libelants, under the law, are not entitled to receive, "notwithstanding that promise which the said Mayster * * * made."

II.

The Court of Appeals correctly held that the sum of $22,000, stipulated for in the contract, would be an unreasonably excessive compensation for the services rendered.

The facts and circumstances of the service are fully stated in the learned and valuable opinion delivered by Judge Speer in the Court below. The office of the argument on this branch of the case will, therefore, be limited

to a review of the evidence bearing on the different important elements affecting the amount of the award.

In *Cope* v. *Valette Dry Dock Co.*, 119 U. S., 625, this Court stated the ingredients of a salvage service that affect the award as follows:

"(1.) Enterprise in the salvors in going out in tempestuous weather to assist a vessel in distress, risking their own lives to save their fellow creatures and to rescue the property of their fellow subjects.

"(2.) The degree of danger and distress from which the property is rescued; whether it were in imminent peril and almost certain to be lost if not at the time rescued and preserved.

"(3.) The degree of labor and skill which the salvors incur and display and the time occupied.

"(4.) Lastly, the value."

Remarking upon these ingredients, the Court said:

"Where all these circumstances concur, a large and liberal award ought to be given, but where none or scarcely any take place, the compensation can hardly be denominated as salvage service; it is little more than a remuneration *pro opere et labore*."

In this classification of the ingredients of a salvage service, the Court placed the risk and enterprise of the salvors first; the value of the salved property last.

According to Lord Stowell, personal risk in the performance of the salvage service is the element which confers the best title to an ample award:

"What enhances the pretensions of salvors most is the actual danger which they have incurred; the value of human life is that which is and ought to be principally considered in the preservation of other men's property; and if this is shown to have been hazarded, it is most highly estimated."

The *William Beckford*, 3 Christopher Robinson, 355, 356.

Sir John Nicholl also took the same view.

The *Clifton*, 3 Haggard, 117, 121.

The most recent expression of judicial opinion in England, in this matter, was announced by Lord Justice Lindley, in the Court of Appeal, as follows:

"The first matter of consideration is the nature of the service rendered, the dangers from which the one ship has been saved and the danger to which the other ship has been exposed. Under this head have to be considered the skill and courage of the salvors, and the risk of life and death as well to the saved as to the rescuers. A salvage service which hardly exceeds ordinary towage is naturally remunerated on a very different scale from an heroic rescue from imminent destruction. The next matter for consideration is the value of the property saved."

The *City of Chester*, 9 Probate Division, 182, 202.

In the most recent work on this subject—that of Sir William R. Kennedy, one of the Judges of the Queen's Bench Division, on *The Law of Civil Salvage*, a subdivision of these main heads more convenient for discussion is suggested, with the following comments:

"Some circumstances are always material for consideration, and these have been ascertained by experience, and the Court has for its guidance a long course of judicial decisions to assist it in coming to a proper conclusion in each particular case. These material circumstances which Dr. *Lushington*, in his judgment in the *Charlotte*, 3 Wm. Robinson, 68, 71, calls 'the many and divers ingredients of the salvage service,' it is necessary now to consider in detail. These may be classified as follows:

(*A.*) *As regards the thing salved.*

1. The degree of danger to human life.
2. The degree of danger to property.
3. The value of the property salved.

(*B.*) *As regards the salvor.*

4. The degre of danger to human life.
5. Their skill and conduct.
6. The value of the property employed in the salvage service.
7. The danger to which the property is exposed.
8. The time and labor expended in the performance of the salvage service.
9. Responsibilities incurred in the performance of

the salvage service, such, *e. g.*, as risk to the insurance and liability to passengers or freighters through deviation or delay.

10. A loss or expense incurred in the performance of the salvage service, such, *e. g.*, as detention, loss of profitable trade, or repair of damage caused to ships, boats, or gear." * * *

"Where all or many of these elements are found to exist, or some of them are found to exist in a high degree, a large reward is given; where few of them are found, or where they are present only in a low degree, the salvage remuneration awarded is comparatively small."

Kennedy, Civil Salvage, 119.

How many of these elements exist in the present case, and do those which are found, exist in a high or low degree? The answer to this inquiry will suggest the amount to be awarded apart from contract.

The main facts in connection with the service, have already been stated (*ante*, p. 3).

A. As regards the "Elfrida."

(**1.**) *The degree of danger to human life.*

It is nowhere suggested, in the allegations of proofs, that the lives of those on board the steamer were, at any time, in jeopardy. The proofs negative any suggestion of danger. The weather was fine continuously (*Report of Weather Observer*, *p.* 253), and there was constant communication with the shore by the vessel's small boat (p. 235). The absence of all risk to life shows, at the beginning of the inquiry, that the service is wanting in that element which has always offered the most conspicuous argument for a liberal reward.

"However great may be the danger to the property itself, if it is wholly unattended with the risk to human life, it assumes much less value than when under circumstances where human life is put in peril."

Dr. Lushington in the *Thomas Fielden*, 32 Law Journal, Admiralty, 61, 62.

The *Bartley*, Swabey, 198, 199.

(**2.**) *The degree of danger to the Elfrida.*

This is the point of most importance. It will be convenient to consider (*a*) the actual danger from which she was relieved; (*b*) dangers reasonably to be apprehended in the future.

(**a.**) *The steamer's actual position.*

It fairly appears, from the libelants' own evidence, that the steamship was not, and had not been, in any danger of physical injury, at any time while she was ashore. She was directly head on to the shore (pp. 115, 196, 238, 250), parallel with, and about 300 feet from, the west jetty (p. 114). She was upright (p. 85), and had made a bed for herself in the quicksand, in which she rested, moving with the agitation of the water (pp. 84, 118, 80). She lay about two feet (pp. 101, 84) in the sand (p. 243), and on the same draft she would have had if wholly afloat (pp. 101, 84); but pumping out the water ballast would lighten it 18 inches (pp. 12, 238). Her measured draft on stranding was 11′ 6″ or 11′ 10″ aft and 9′ forward; and after the ballast removed it was 9′ 6″ aft and 9′ forward, while the depth of water was 9′ aft and 7′ forward (*ante*, pp. 3, 4).

The tide, as appears from the record produced by Lieut. Judson of the United States Engineers' Office at Galveston (p. 120) was very irregular. The gauge from which the record was made is at Galveston, but the height of the tides would be substantially the same at Velasco (*Judson*, p. 120). The mean low (p. 121) tide, on the record, is represented by the heaviest black line. During the time the steamer was ashore the high tide varied from about 2′ 9″ up to 3′ 3″, but on two days was as low as two feet. This variation of the depth of water around the steamer, at high tide, may account for the different figures furnished by the different witneses on that subject. The steamer's witnesses said the vessel lay in about nine feet of water, at the top of high tide (pp. 184, 208, 225); and this is expressly admitted in the amended libel (p. 12).

The claim of some of the witnesses, that the dispatch

with which the vessel came off was accounted for by an exteremely high tide, is not borne out by the record. Though the tide was higher on the 17th, than on some of the other days of the month, it was not so high as on the 9th, 10th, 14th and 15th, nor higher than it was on the 15th, 16th, 18th and 19th. It was much higher later in the month (see print, p. 120).

The depth to which the steamer was imbedded in the sand must have varied with the different stages and heights of the tide. The chief engineer, Dove, says: "We weren't bedded much in the sand" (p. 232). On the 9th, when there was a very high tide (see print, p. 120), Morrisey, at 12.10 A. M., telegraphed to Moller & Co. that the *Elfrida* was "*swinging freely on high tides, showing no bed*" (fol. 23, p. 185). The ease and rapidity with which she came off on the 17th, when the tide was four or five inches lower then on the 9th, shows that she could not have been very hard aground.

Her position on the beach was such that the sea affected her but little.

The testimony of libelant's witness, Hutchings, who has been Superintendant of the Life Savings Station of the Gulf of Mexico for 13 years, is important in this connection. He says the shore at Velasco is very flat, sloping out gradually (pp. 96, 99). To reach a (p. 99) depth of 14 or 15 feet, one would probably have to go out three-quarters of a mile (p. 99).

The worst break of the waves, in case of a storm, is in 12 or 16 feet of water (p. 99). As the steamship was lying in 9 feet of water she was well inside of the place where the greatest force of the waves would be broken.

The master also says there was no sea in and about where the ship lay (p. 238). Hutchings says the coast is not so dangerous to a stranded vessel, as that of the Atlantic (p. 99).

By the log it appears that the steamer drifted over the breakwater about 8 P. M. of the 6th, in a considerable sea, and that at 2 A. M. on the 7th she went further on the beach (pp. 245, 246). From then until she was removed from the beach, she lay in the same place, without changing her position (*Coveney*, p. 84). On one day only, Oc-

tober 10th, was there any pounding of the bottom. On that day the log reports strong southerly gale and high sea, ship straining and bumping heavily (p. 246).

On the 14th and 15th, the log reports very strong southeast gale, but the ship "lies fast on the ground," and there is no bumping (p. 247). Bumping on the 10th is probably accounted for by the fact that, with a southerly gale, the incoming waves would strike the vessel slantingly on the port side, while, with a southeast gale, the waves would be directly astern. The ship was lying about southeast and northwest.

Except on these three days, the log reports fine weather; and the evidence of the captain is to the effect that the report of the weather in the log on the 14th and 15th is exaggerated (p. 242). The master and the other witnesses for the steamer say the weather was fine during the whole time that the vessel was on the beach (pp. 234, 235, 236, 241, 225, 226, 228, 242, 244).

The testimony of these witnesses is corroborated by the official weather report (p. 253), from which it appears that the wind was blowing off shore during the time the vessel was on the beach, except on the afternoon of the 9th, and on the 10th, 11th, 12th, 15th, 16th and 17th.

From that unimpeachable record, offered by the libelants, it appears that the weather was clear from October 5th to the end of the report, on the 25th. The wind on the 7th, 8th and 13th was blowing *off shore*, the greatest velocity being 28 miles an hour. On the 9th it was south, with a velocity of 13 miles at 8 A. M. and 7 miles at 8 P. M.; on the 10th it was southeast with a velocity of 5 miles at 8 P. M. and 11 miles at 8 P.M.; on the 11th it was southeast with a velocity of 9 miles at 8 A. M. and 14 miles at 8 P. M.; on the 12th it was southeast with a velocity of 6 miles at 8 A. M. and 11 miles at 8 P. M.; on the 13th it blew off-shore; on the 14th it was easterly with a velocity of 15 miles at 8 A. M. and 7 miles at 8 P. M.; on the 15th it was southeast with a velocity of 9 miles at 8 A. M. and 11 miles at 8 P. M.; on the 16th it was southeast with a velocity of 5 miles at 8 A. M. and 7 miles at 8 P. M.; on the 17th, when the ship was hauled off, the wind was still southeast, with a velocity at 8 A. M. and at 8 P. M. of three miles.

It needs no argument to show she was in no danger from the winds. During the rest of the month 16 miles was the highest velocity recorded (p. 253).

The actual position of the vessel was not one of danger (p. 238). The sand was not banking around her (pp. 206, 210, 212, 87). It was a position from which she was easily and promptly removed. None of the libelants' witnesses pretend that her situation was one of present danger. The danger they spoke of lay in the future. It was potential and was based on the hypothesis of gales between the southeast and southwest.

(b.) *Probable future danger of the vessel.*

Here we enter the region of speculation. The libelants called a number of friendly witnesses, to whom counsel described the position of the vessel with more or less accuracy, who united in saying that in certain conceivable contingencies the ship would probably have been a total loss. But on cross-examination they were unable to point to a single instance where a large iron steamship, ashore anywhere on the Texas coast, had become a total loss. There was some evidence that wooden vessels, which had no steam power to aid in getting them off, and whose cargoes were not stated, had broken up. Some small iron boats had also been lost. One vessel, which had stranded broadside on the beach remained there about two months, and broke her plating so that a witness could put his hand through it. Another witness described the stranding of a steamer further to the southwest, where sand had banked on the inshore side of her, so that a stork stood 10 feet from her, on one leg (p. 104). But this was on a different kind of shore (p. 106) and those vessels were ultimately hauled off.

The gist of the evidence given by the pilots and friends of the libelants, as to the probable future danger of ship, is no more favorable and is less reliable than that of their witness Hutchings, Superintendent of the Life Saving Department, whose evidence has already been referred to, and who was their most competent expert.

Hutchings testified that no iron steamer had been lost

on that coast from stranding in his thirteen years' experience (p. 100). He mentioned but one instance of an iron vessel which had been seriously damaged (p. 105), and that one was ashore on a part of the coast where the bottom was different from that at Valasco (p. 106).

Considering the danger of a stranded vessel, on the coast, in connection with the probabilities of her ultimate safe removal, this witness testified as follows (p. 100):

"Q. Has there ever been an iron steamer lost on his coast from standing in your experience? A. No, sir.

Q. Every one has been gotton off? A. Yes, sir. One was in an awkward position for ten or eleven days, and it was doubtful whether it would be gotten off or not.

Q. Has it not been the experience of persons knowing about matters of this kind that it is within a reasonable certainty, that a vessel, stranded on a coast like this, can be hauled off by means of anchors, in the ordinary weather which prevails here?

A. Yes, sir. I do not see why an ordinary vessel could not be hauled off with the ordinary apparatus if the weather is favorable, every-day weather.

Q. Is it not [a fact], therefore, that the preponderance of probabilities are in favor of a vessel getting off, when she gets aground, under ordinary circumstances along this coast? A. Yes, large vessels; small ones, no.

Q. Iron steamers in ballast? A. Yes, under ordinary circumstances."

Moller, another witness for libelants, testified (p. 138):

"Q. How long have you been a ship broker? A. For twenty-five years. I have been nineteen years in business for myself.

Q. There have been vessels sent to you before this one that have been beached? A. Yes, sir; I have taken several off myself.

Q. All iron steamers sent to you have gotten off when wrecked? A. Yes, sir.

Q. Mr. Clarke got most of them off, or helped to do so? A. Yes, sir.

Smith, another witness for the libelant, said: "You can almost take anything off the beach. The question is whether it is worth it. If it was up in the prairie it might be gotten off" * * * (p. 74).

The preponderance of probabilities was always in favor of the vessel getting off. Her position, head on the beach, was most favorable. She was perfectly upright, at high tide was lightly aground and at extreme high water she was afloat at the stern, and swinging (fol. 23, p. 185). She was able, by removal of her water ballast and coal, to lighten her draft so that she would not be aground, if at all, more than a few inches aft in the quicksand. She was undamaged, having the full use of her machinery and steam, and was in such a position that the jetties protected her from east winds. When the winds wore around from the east to the southward they would not be likely to increase to gales, because when the wind moves around with the sun, fair weather is portended (*Coveney*, p. 88).

A season of the year had been reached when *severe* weather from points between the southeast and southwest was not to be expected. Hutchings said the October winds were generally northwest and northeast (p. 97). Libelants put in a table compiled by the local forecast official of Galveston from official records (p. 146), showing that for twenty years past the prevailing direction of the wind in the month of October had been southeast, but with an average velocity of only 10 miles an hour; and that during the like period for the months of November and December, the prevailing direction of the wind was *north*, offshore, with an average hourly velocity of nine and ten miles respectively.

Unless, therefore, it was to be assumed that this November and December would be different from those of the preceding twenty years, the weather reasonably to be expected for the next two months and a half, was no menace to her safety. The wind would be off shore most of the time, and when it came on shore would come with little force.

We think it is fair, therefore, to say that the libelants' evidence tended very strongly to exaggerate the probable future danger of the vessel. Her situation was rather one of deadlock, than of danger. She was out of her element, and needed assistance to get off, but with the assistance of anchors and cables, there was no reasonable

probability that she would not get off in safety. If she had been supplied, or could have obtained additional anchors, it was the belief of the pilot (pp. 86, 90) and of the master (p. 215) that she could have got herself off. The experienced libelants, who had never failed to get a vessel off (pp. 106, 108, 111, 112) were almost certain of prompt success when they entered on the work, and attained it within four hours, after they were ready to pull.

The salvors, moreover, erred in laying so much stress on the possible future dangers of the vessel. Such dangers, unless imminent at the time of the service, afford no ground for enhancing an award.

In the *Emulous*, 1 Sumn., 207, 215, Mr. Justice Story dealt with this subject as follows:

"Salvage is a compensation for the rescue of the property from present, pressing, impending perils, not for the rescue of it from possible future perils. It is a compensation for labor and services, for activity and enterprise, for courage and gallantry actually exerted, and not for the possible exercise of them, which, under other circumstances, might have been requisite. It is allowed because the property is saved, not because it might have been otherwise lost upon future contingencies. Subsequent perils and storms may enter, as an ingredient, into the case, when they were foreseen, to show the promptitude of the assistance, and the activity and sound judgment with which the business was conducted; but they can scarcely avail for any other purpose. Ought the salvage to be dimished by a favorable state of the weather after the arrival in port? If not, why should it be increased by an unfavorable state of the weather? To introduce such ingredients into the estimate of salvage, which were neither foreseen, nor acted upon, would compel the Court to deliver itself over to conjectures, resting on loose probabilities, the nature and extent of which could never be measured. It would be to go off soundings; to desert the facts; and to be guided by speculations, always questionable, and sometimes deceptive."

(**3**.) *The value of the property saved.*

The libelants introduced no expert evidence on this subject. They rely upon the master's statement, on cross-examination, that it was "about £22,000 (p. 213). He

was not shown to have the slightest knowledge of tonnage values. This was his first command. He was only 28 years old, and had been master only *one month* before the stranding (pp. 193, 194). He did not assume to give any reliable information on the subject. All he said was: "that is as near as I can get at it. *It might be less*, as they diminish in value all the time" (p. 213).

The best and only expert evidence as to the ship's value was furnished by Mr. Bell, one of the owners, an exceptionally qualified witness. He had managed more than twenty steamers in the preceding twenty-five years, and at the time of his examination was the largest owner of shares in the eleven steamers operated by his firm of Pyman, Bell & Co. He had been an owner in about thirty steamers under the management of other firms; had been for many years a director of several steamship mutual associations in West Hartlepool, Whitby and London, and had negotiated the purchase and sale of steamers for many years. He states that a liberal estimate of her value, *after having been taken to Newport News and repaired*, would be £14,000 (p. 148). The amount for which she was insured at the time of stranding was £18,000, but this was reduced before his examination to £16,000. Those amounts were book values only, and had regard to the fact that the steamship was bought at a time when tonnage was 15 per cent. dearer than it was at the time of the salvage service (p. 148). As this evidence was taken long before the trial, and the libelants made no attempt to contradict it, the value of the vessel should be taken, for the purposes of the suit, at $70,000. This was the finding in the Court of Appeals (pp. 269-270).

(4.) *The degree of danger to human life.*

There is no intimation in the libelants' testimony that there was any danger to their lives in the performance of the service. It was testified for the claimants and not denied that there was no such danger (p. 226). The weather was fine when the salvors came, and the sea was smooth, and both continued the same during the two days the salvors were at work (pp. 228, 233, 235; Official Record, p. 253).

(**5**.) *The salvors' skill and conduct.*

The circumstances were not such as to call for the display of high skill, or the exhibition of intrepidity or heroism on the part of the salvors. Their plant was brought from Galveston to Velasco upon a small schooner in tow of a tugboat (p. 36). We know by the weather record (p. 253) that the weather was fine during the passage. At Velasco anchors were transferred to Brock's barge, and from the barge were planted off the steamer's starboard quarter (p. 233). The steamer's anchors were then taken from the bow onto the barge and planted off the other quarter (p. 39). The fifth anchor was placed on the starboard side (p. 235). Rope cables were attached to the chain cables and carried aboard the steamer, each cable being put around the drum of two winches. The *Elfrida's* engines and steam working, the propeller astern, and straining with her four winches, and the windlass on the cables for four hours, hauled her over the sands to deep water (pp. 40, 41, 226, 228, 232, 233).

The salvors' tug never put a line to her until she was afloat (p. 213).

(**6**.) *The value of the property employed in the salvage service.*

(**a**.) The appellant's claim that more vessels are risked than the evidence shows were employed in the service. It is said two tugs, two schooners and two barges were engaged about the work (Brief, p. 37). But the evidence shows that only one tug and one barge were used in laying the anchors, connecting the cables to the steamer, and attending her, until she put out to sea.

Scott, chief officer (p. 226), testified;

"Q. What kind of an expedition did the salvors have? What did it consist of? A. They brought three anchors, and hawsers, &c., and small boats.

Q. How many tugboats and lighters? A. One tugboat and one lighter at at a time."

Clarke, libelant, also testified that only one tug, and only one schooner was in use (p. 44), and intimates that

but one lighter was engaged, saying "I was on *the lighter* till the anchors was laid" (p. 39).

The fact that he may have had other vessels at command in the harbor cannot be considered, any more than his floating property in other harbors.

(**b**.) The value of the tug in use was not referred to by Clarke, though he was twice on the stand. It seems that he undertook a responsibility of $6,500 in respect of the lighter (p. 38). Nothing was said about the value of the anchors or cables. The value of these properties was peculiarly within the knowledge of the libelants. The fact that they failed to state it should not incline the Court to estimate it at a very high figure. It seems probable that $20,000 would be a liberal estimate of all the property risked by the salvors in the adventure.

(**7**.) *The danger to which the salvors' property was exposed.*

The salvors did not themselves testify to any danger to their property in the condition of wind and sea which actually prevailed. With a wind blowing at the rate of three miles an hour (p. 253), it is obvious there could not have been any sea running. Clarke, himself, said not a word on the subject. This point need not, therefore, be discussed.

(**8**.) *The time and labor expended in the performance of the salvage service.*

Clarke received notice from Moller and Sorley, on the 14th, that his bid was accepted (p. 34). On the same day he went with his tug and schooner and outfit from Galveston to Velasco (p. 35), where on the afternoon of the 15th the contract was signed. On the 16th and 17th until about three o'clock (p. 233) the salvors were engaged in laying the anchors and connecting the tackle with the vessel. They began to haul at about three or half-past three (p. 233), and at half-past seven the ship was free of the ground and proceeded to sea (Mate's log, p. 247; Engineer's log, p. 250). The whole of the time oc-

cupied in hauling her off the beach after they began to pull was about four hours (pp. 226, 230, 233, 236).

From the time Clarke heard his bid was accepted (p. 34) until the ship was afloat was exactly four days.

(**9**.) *Responsibilities incurred in the performance of the salvage service, such as, e. g., risk to the insurance, &c.*

No evidence was produced by the libelants on this subject.

(**10**.) *Loss or expense incurred in the performance of the salvage service.*

There was no evidence of any items under this head.

This analysis of the service, considering its elements separately and apart, shows that it was not such as would ordinarily induce a court of admiralty to give a liberal award.

In its essential features, the case is strikingly like that of The *Hesper*, 18 Fed. Rep., 696, where the Circuit Court reversed the decree of the District Court for the Eastern District of Texas (18 Fed. Rep., 692), and reduced the salvage from $8,000 to $4,200. A comparison of the two cases shows the following results:

1. The *Hesper* stranded December 12, 1882, on Galveston Island.	1. *Efrida* Standard October 5th, near Velasco.
2. Her value was £22,000.	2. Her value about £14,000.
3. Her net tonnage, 1,069 tons.	3. Net tonnage, 1,454.
4. Supplied with winches and windlasses.	4. Ditto.
5. Had a cargo of 900 tons of salt	5. No cargo.
6. Went ashore at a speed of about 4 knots an hour.	6. Drifted ashore.
7. Struck easily, without shock, and remained upright.	7. Ditto.
8. Her draught, 13 feet 9 inches.	8. Draught 11′ 10″and 9′.
9. Sea smooth; very little wind from the south.	9. Sea moderate; wind S. E.
10. Ship headed Northeast by North.	10. Headed about N. W.

11. Efforts made with Kedge anchor and engines to heave her off.	11. Ditto.
12. Assistance called for from Galveston.	12. Ditto.
13. December 12 P. M., small tug *Estelle* sent to her assistance.	13. Oct. 6th and 7th, Brock's tug assisting.
14. Ineffectual efforts made by tug *Estelle* for two hours to float the ship.	14. Efforts of Brock's tug ineffectual.
15. Sea subsequently became turbulent.	15. Ditto one day.
16. *Estelle* left the *Hesper* the same night.	16. *Elfrida* awaiting assistance 4 or 5 days.
17. December 13, the *Hesper* shifted her position slightly; pumped up her ballast tanks; threw cargo overboard.	17. *Elfrida* remained in same position, with ballast in.
18. December 13, tug *Buckthorn* and a steam lighter took a heavy anchor and cables and two hawsers to the steamer.	18. Oct. 16th, *Josephine* and barge planting anchors.
19. On the 14th tug *Buckthorn* planted the anchor at sea in 18 feet of water, and carried her cables 210 fathoms to the *Hesper's* steam winch.	19. Oct. 17th, ditto until 3 P. M., and bringing cables to winches.
20. Same day men engaged throwing over cargo.	20. Pumped out ballast.
21. *Hesper's* hove on hawsers and used her engines, *Buckthorn* assisting with line, with no effect.	21. Same day *Elfrida* hove on hawsers and used propeller. Came off in 4 hours.
22. December 14, tug *Estelle* arrived alongside; another lighter came alongside; taking off cargo.	22. ——
23. Same day, when a third of the cargo had been removed, and the water ballast pumped out, the steamer was got off by the use of her own engines, and her steam winch pulling on the one anchor, *Estelle* and *Buckthorn* assisting by pulling on line.	23. ——

24. Time employed in the service, three days.	24. Two days.
25. Value of salvors' property employed, about $35,000.	25. Say $20,000 (big estimate).
26. Place where *Hesper* was stranded, slope of ground seaward was gradual, bottom sandy.	26. Ditto.
27. During the time the *Hesper* was aground, there was no wind or sea of any danger to ships, and the services rendered to the *Hesper*, aiding her to get off, were not attended with any hazard or danger.	27. Ditto.
28. The value of the *Hesper*, which was entirely uninjured, was $100,000, and her cargo, $6,500.	28. Value of *Elfrida*, say $70,000. No cargo.
29. The *Hesper* had no protection against wind or sea, from any direction.	29. *Elfrida* had protection of jetties against all winds from N. E. to S. E.
30. The amount of the award in the *Hesper's* case, $4,200.	30. Award against *Elfrida*, $10,000.

The only material point upon which no comparison between the cases is made relates to the depth to which the vessels rested in the sand. From the comparatively greater ease with which *Elfrida* came off, it is a fair inference that she was at least not harder aground.

By analogy to the *Hesper* case, it would appear that an award of $5,000 might reasonably have been expected for service to the *Elfrida* if the amount had been left wholly to the Court.

We have not been able to find any other reported cases bearing close resemblance to the present. It may be instructive, however, to notice a few where the peril was much greater and more imminent, the service much larger and more arduous, the values risked and saved far above those involved here, and where the Courts have, nevertheless, awarded relatively not more than one-third of the amount here claimed.

In *Pent* v. *The Ocean Belle*, 19 *Fed. Cases*, 200, a ship with cotton, stranded 30 miles from Key West, was

hauled off in good weather by eight wrecking vessels, with 64 men, and a steam propeller with 21 men, after lightening her of 1,140 bales of cotton. She was then towed around an extensive shoal, about 70 miles, to the harbor of Key West. Marvin, *J.*, awarded $13,000 upon an aggregate value of $165,000, it appearing that had the weather been bad, the ship would have been in great peril of total loss.

In the *Diadem*, 7 Fed. Cases, 632, a ship and cargo, of the estimated value of $125,000, on a voyage from New York to New Orleans, got ashore on Long Key. She was in imminent peril of total loss, but was saved by the libelants with their vessels, which carried 68 men, and 28 men in small boats. For this service Marvin, *J.*, decided that $12,000 would be reasonable salvage; but that in consequence of negligence and errors of judgment of the salvors and delay in getting the vessel off the reef, this amount should be diminished one-half.

In the *North Erin* (71 Fed. Rep., 430, deficiently reported), a large steamship with a cargo consisting chiefly of green fruit, ran ashore on the outer end of Long Island, at the top of high water, and at a speed of 7 knots in fog. She was immediately swung around, by the sea, until she lay broadside on a quicksand beach, in which she settled about one and a half feet. She was unable to move by her own power or anchors, and, in case of a rising sea, would have been in a critical position. A powerful wrecking tug, of large value, with the owner aboard, came 80 miles to her assistance, and at the next high water, after pulling about three hours, having the assistance of the steamer's engine and sails, dragged her off into deep water. The tug was engaged going and coming for two days, and supplied hawsers and appliances. The green fruit would have been greatly damaged by any considerable delay. Neither ship nor cargo suffered any damage. The salved values were about $100,000. The Court, upon the special facts, awarded $10,000.

The *Lamington*, 86 Fed., 675, to which appellants refer (Brief, p. 62), is not at all analagous. The service there

extended over twenty-two days, was attended with great risk, both to life and to property, and was performed with high skill under most adverse circumstances, yet the award was only $8,600, though the salvor's cash outlay had been $5,000.

In the *Guadalupe*, 20 Fed., 433, the District Court for the Eastern District of Texas awarded $8,000 to five tugs for floating a steamer, valued, with her cargo, at $645,000, which had run ashore at high speed in fog near Galveston.

By this comparison of other cases it appears that the libelants have recovered twice as much as any admiralty court presumably would have allowed them. They want four times as much. So great an excess in their agreement, we submit, is unreasonable and inequitable towards the property charged with its payment, and fairly justifies an admiralty court, as a court of the purest equity, in setting the contract aside.

III.

If satisfied that no important error of law was committed by the Court of Appeals, this Court will not enlarge the award of $10,000 unless satisfied that the amount was glaringly inadequate.

In the *Sibyl*, 4 Wheat., 98, where the Circuit Court had diminished, by fifty per cent., the award of the District Court, Chief Justice Marshall, on appeal to this Court, said:

"In such cases it is always impossible that different minds contemplating the same subject should not form different conclusions as to the amount of salvage to be decreed and the mode of distribution. * * * Appeals should not be encouraged upon the ground of minute distinctions, nor would this Court choose to reverse the decision of a Circuit Court in this class of cases unless it manifestly appeared that some important error had been committed."

The same question was again before the Court in the *Connemara*, 108 U. S., 352, 359, where Mr. Justice Gray said:

"By the uniform course of decision in this Court, during the period in which it had full jurisdiction to reverse decrees in admiralty upon both facts and law, as well as in the Judiciary Committee of the Privy Council of England, exercising a like jurisdiction, the amount decreed before was never reduced unless for some violation of just principles, or for clear or palpable mistake, or gross over allowance (Hobart *v.* Drogan, 10 Pet., 108, 119; the *Commanche*, 8 Wall., 448, 479; the *Neptune*, 12 Moore P. C., 346; the *Carrier Dove*, 2 Moore P. C. (N. S.), 243; Sc. Brown & Lush., 113; the *Fusilier*, 3 Moore P. C. (N. S.), 51; Sc. Brown & Lush., 321)."

To the same effect also are the cases of the *Tornado*, 109 U. S., 10; the *Hesper*, 122 U. S., 256, 266; and the *Excelsior*, 123 U. S., 40, 51.

IV.

The agreement was inequitable, even if judged solely by the position of the parties, and of the property, at the time it was signed.

(**1**.) The parties did not stand on an equal footing in making the contract (*Post*, Point V.).

(**2**.) The situation of the property and the apparent difficulties of the service were not such as to justify an agreement for such a large amount.

It has been shown that, with her ballast pumped out, the ship was in the sand at her stern only six inches. She was upright, moving with the agitation of the waters, was undamaged, and, being right angles to the beach, was in a most favorable position to be hauled off. The weather was fine, and there was no immediate prospect

of change. Both the pilot and the captain were of opinion that if they could have obtained the necessary anchors, the ship could have been removed without the assistance of salvors (*Coveny*, p. 86; *Burgess*, p. 215).

Mr. Bell, one of the owners, testified most positively that if he had known the real position of the ship as he subsequently understood it was [his assumptions, as stated in his testimony, accord exactly with the facts as proved], he would not have authorized the acceptance of such a large tender (Answers to 9th, 11th and 13th Interrogatories, pp. 150, 151, 152).

No witness in the case assumed to testify that the contract was reasonable in any view. The burden to show this rested on the libelants (*cases ante*, p. 40).

The circumstances show that the agreement was made by the captain improvidently with little consideration of the elements which constitute a meritorious salvage service, and that the salvors demanded an excessive sum in proportion to the expenses and obligations which they assumed. The captain had no previous experience of such a situation, and the circumstances do not indicate that he had formed any reasonable judgment as to the peril of the ship, or the difficulties that would attend her removal. The case is not one where the work was more easily accomplished than could reasonably be expected, through accidental or favorable circumstances. It was done under the exact conditions reasonably to be apprehended when the agreement was effected. The Tide Record (p. 120) clearly shows that there was no unusual tide. All the circumstances were exactly what Clarke must have understood they would be.

The fact that the libelants agreed to limit their time to twenty-one days is not of material importance. They did not engage under the agreement to work for twenty-one days (pp. 15–16). If they had failed to get her off on the 17th of October, there was nothing in the agreement to prevent them from picking up the anchors and abandoning the work at a time when the expenses would have been very slight in proportion to the chances of success. Another reason for saying that this limit was unimportant is that there was nobody else to take up the work. If,

for any reason, a longer time had been required for the service, there is every probability that it would have been granted.

The contract did not bind the salvors to any heavy expense. The usual mode of assisting a vessel in the *Elfrida's* position is by means of anchors planted in deep water. When that work was once done the salvor's expenses would be substantially at an end. The agreement provided that they were to have the use of the ship's crew and of her engine in their work; and it was held in the District Court that the use of the "engine" included use of the four steam winches, which are hoisting engines, placed on deck, and of the steam windlass. After the preliminary work of putting down the anchors was performed the only other work, apparently, that could be done would be for the ship to heave on the winches and windlass with her own steam, which was to be furnished at her own expense. Moderately rough weather would be better for this purpose than fine weather, as it would raise the ship from her bed at the stern; and keeping a high tension on manila ropes under such circumstance causes a vessel to go astern with each rise.

In view of the vessel's position and of slight risks and obligations undertaken by the libelants, as compared with those they got the captain to assume for the vessel—in effect to heave herself off, with the aid of some of their anchors—the amount promised to be paid was unreasonable, looking at the matter even as of the date of the contract. Regarding it in the light of the event, as the Court of Appeals was right in doing, there is hardly room, as we submit, for an argument to the contrary.

V.

The Court properly held that the parties did not stand on an equal footing in negotiating the salvage agreement.

(**a.**) Clarke was the only salvor in Texas, with the necessary anchors and appliances for doing the work, whom the captain could employ.

Moller, a witness for the libelants, who had been a ship broker in Galveston for twenty-two years, testified there were but two sets of salvors in Galveston who could have performed the service, the Galveston Steamship and Lighterage Company, and Charles Clarke & Company. Moller's firm were charterers of the *Elfrida* at the time of her stranding (p. 128). Immediately on hearing the ship was ashore, Moller went to the manager of the Galveston Steamship and Lighterage Company, of which he was a stockholder, and asked the manager if he would send tugs and appliances to Velasco to assist the ship off. The company declined to undertake the work (p. 129), the reason apparently being that they had no heavy anchors (p. 111).

Moller further says:

"Then the only other appliances I knew of in this town was Charley Clarke & Co., who at various times have been engaged in the same business. In fact, I have personally taken three or four vessels off the beach with the assistance of Charles Clarke & Co. (p. 120). * * *

"Q. Was it the sum of your evidence that there was no one else to do this work except Charles Clarke? A. At Galveston; yes, sir.

Q. At Velasco? A. Outside of Clarke and Brock, I did not know of any tugboats that were able to pull a tree off the beach.

Q. Did anybody else have any plant to do it with? A. Yes, sir; north of Galveston" [alluding to the Merritt Wrecking Company of New York.]

"Q. Here? A. I am not aware of any such plant existing" * * * (p. 134).

"Q. There have been vessels sent to you before this one that have been beached? A. Yes, sir. I have taken several off myself.

Q. Apart from this lighterage company in which you were interested, I understand you to say that Mr. Clarke has the only heaving anchors fit for this work? A. The only anchors fit for a job of that kind.

Q. Anybody else got any? A. I am not prepared to say. I think there are some smaller anchors here, but I think he has probably the only heaving anchors in this port.

Q. When the captain applied for assistance, did you go to anybody else? A. There is nobody else here but the Galveston Lighterage Company.

Q. And it was Clarke or nothing? A. Yes, sir; unless we had waited for wreckers from the Northern States" (p. 138).

McDonald, another witness for libelants, a Galveston pilot, testified:

"Q. Who else besides Captain Clarke has appliances sufficient to get a steamer off? A. I do not think that anybody has except the Galveston Lighter Company. Captain Clarke has done about all that work, except when the New York Wrecking Company came to the relief of the *Australia*.

Q. Is the Galveston Lighter Company the company Mr. Moller is interested in? A. Yes, I think he has some stock in it.

Q. What kind of lighters do they use? Steam propellers? A. Yes, sir; and barges.

Q. Have they heavy anchors? A. Their own anchors are not heavy" (p. 111).

Hutchings, also a witness for the libelants, superintendent of the Life Saving Department in Texas, testified (p. 102):

"Q. Do you know who has done most of the salvage work along these waters? A. Clarke & Co.; Mr. Charles Clarke has attended to several vessels that has been stranded under my operation as an officer. * * *

Q. Hauling off with anchors is generally accepted as the safest and surest way? A. Yes, sir; the only way I know of until she is afloat, and you can get steam service. * * *

Q. Do you know anybody else here who had heavy heaving anchors? A. I do not know.

Ross, a witness for libelants, who was a stevedore at Velasco, and a foreman for Brock, the other salvor, who had been working on the vessel in the early days of her stranding, testified (p. 123):

"Q. Had Brock no anchors suitable for the purpose in Velasco? A. No, sir.
Q. Had he anywhere? A. No, sir.
Q. Did anybody else have any except Clarke? A. Not to my knowledge."

(**b.**) Clarke was a man of far greater experience, and had a better knowledge of the coast, the difficulties to be encountered, the chances of immediate success in the undertaking, and of the weather reasonably to be expected, than the captain.

Clarke's age is not stated, but as his son Charles Clarke, Jr., was a member of his firm and a co-libelant (p. 35); he was obviously a man of mature years. The libelants' witness McDonald says that Clarke was a capable and experienced man in salvage matters; "as far as I know, he has had more experience than any man in Galveston." He had done all the salvage work on steamers stranded along the coast, except in one case (p. 111). It was mentioned especially that he had removed the *Hesper* from the beach by anchors, a vessel whose situation was much more grave than that of the *Elfrida* (p. 112, and the *Hesper*, 18 Fed., 692; on appeal do., 696). It is known that he was also engaged in the *R D. Bibber* (33 Fed., 55, 56). Moller, who had known him for many years, testified that Clarke had taken several vessels off the beach for him (pp. 129, 138). Hutchings, of the Lighthouse Department, said Clarke had done most of the salvage work along the coast. and had attended to the salvage of several vessels under his operation as an officer. So far as appears, he had never failed to float an iron vessel on which he was engaged along the coast. His experience must, of course, have familiarized him with the difficulties likely to be encountered, and have enabled him to form a judgment as to the weather reasonably to be expected, and the promptitude with which he could

accomplish the work. His knowledge of the prevailing direction and force of the winds in that season enabled him to judge of the probability of sand accumulating about the vessel.

The witnesses who referred to the banking of sand stated that it was caused by currents, dependent on the wind (McDonald, pp. 108, 109; Coveney, p. 88; Hutchings, p. 98). Scrimgeour (p. 92) says that sand will bank up around a vessel only on the side where there is an eddy, and that a change of current will cause it to disappear. "These sands move with the current. It is fine, movable sand. The water is thick with it" (p. 92). To the same effect, Hutchings (p. 102). Coveney's evidence that the only banking around the *Elfrida* was under the bluff of the bow (p. 87) tends to confirm Hutchings' evidence.

The record of the weather for twenty years shows that the prevailing direction of the wind for October is south-east, with an average velocity of ten knots an hour (p. 146). The vessel was lying with her stern to the south-east and head to the north-west (Coveney, p. 88); so that the only tendency of that wind would be for the sand to bank, as it did, in front of her, or nearer the shore. Coveney was cross-examined on the exact point:

"Q. If the wind had changed to the south-east, would there have been danger of the sand banking? A. Probably not from the south-east, because it was right in line with the ship" (p. 88).

And it seems evident that an expected wind velocity of ten knots an hour would not create any such current as would be liable to cause any serious banking of sand. Indeed, this is in a measure proved by the fact that it banked very slightly, if at all (p. 210) during the twelve days that the ship was ashore.

The master was without knowledge, or the means of knowledge, of any of these important matters. Though he had been to sea for a good many years, this was his first experience with a stranded vessel (p. 195). He was but twenty-eight years of age (p. 194). The *Elfrida* was his

first command, and he had been captain of her only one month when she went ashore (pp. 193, 194). It was also his first visit to Velasco (p. 195). He, of course, had the means of knowing, and did know, that the sand had not actually banked around the ship (p. 210); but what was likely to happen in the future he did not know. Clarke himself represented strongly to the master that sand was likely to bank around his ship, and it was this which chiefly influenced him in closing the agreement (Cables, Exhibits D and E, p. 218; Burgess, p. 206, 243).

On the 9th he had cabled his owners the amount of the two tenders received, one from Brock for $24,000, and one from Clarke for $22,000 (p. 205), recommending acceptance of the lowest (p. 218). To this the owners replied, October 10th.

"Don't act without our instructions. Lloyd's underwriters communicating direct, as consider tender excessive. Try get condition in tender giving us right abandon vessel to salvors in lieu of salvage charges (Ex. 27, p. 185).

This was evidently communicated to Clarke, who was still in Velasco (p. 34); for on the following day, the 11th, the conditions of weather and sea remaining unchanged, the master sent two further cables to Newcastle, based, as he says, on Clarke's representations (p. 205). The first cable was Exhibit D:

"Delay will cause danger of sand banking, also increased cost of floating."

Later on the same day he dispatched Exhibit E:

"Fresh breeze blowing. Vessel laying easy, making no water. Afraid of sand banking up" (p. 318).

In explanation of these cables, the master said (p. 205):

"Well, I sent this cable, Exhibit D, when Mr. Clarke said that if I did not receive word soon he would want more for floating the ship, as there was a bank forming around her, and I cabled my owners to that effect."

Exhibit E was sent upon similar representations (p. 205).

So far as the present was concerned, the master knew the sand was not banking up around her.

"Q. Did you examine to see whether it was forming while she was lying there? A. Yes, sir.
Q. What did you discover? A. I found the sand was not making any at all, or very little (p. 210).
Q. Now, captain, what was the actual fact as to this banking of sand around the steamer at the time she was floated? A. It was hardly perceptible" (p. 206).

But as to the *future* danger of the banking of sand, the element on which the libelants most relied, the master was without the means of knowledge. On that subject he testified:

"Q. Were you fully advised as to the seriousness or ease which the vessel could be got off the place where she was then stranded? A. No * * * I have not had any experience along the Gulf coast; there are few coasts where there is such an extent of beach as here (p. 199). * * *
Q. Captain, I understood that you had just as good means of knowing whether the sand would form around the vessel as anybody else had? A. I am not a native down there. I do not know what it would do in a breeze of wind. Sometimes it will shift in a breeze of wind, and sometimes it will not.
Q. You had the same means to find out whether the sand had actually formed or not? A. Yes, sir; but it did not form" (p. 12).

Such knowledge as he had of the coast, derived from having "driven all along it in a cart," quoted in appellants' brief, p. 23), was derived *after the ship was floated* (p. 224).

(**c**.) The master was practically compelled to accept the contract by Clarke's refusal to take less, and his threat to ask more if the contract was not promply made.

It is true that when Captain Clarke first came to the ship (October 8th) he offered to do the work for what the United States courts would allow (p. 209). This offer was never communicated to the owners, and they were ignor-

ant of it until after the service was completed (Bell, p. 154). The captain's reason for refusing it, he says, was "simply because I thought that if he got the work he might extend the work. I have known of that being done" (p. 216). The master was gravely at fault for not cabling this over to the owners, as they would have accepted it (p. 150). This circumstance, however, should not prejudice the case against the owners' property (The *Tennasserim*, 47 Fed , 119, 120). It is actually immaterial, however, because a week later, and before signing the contract, Clarke refused to do the work at all except for $22,000. The offer to do it on a basis of a salvage compensation seems never to have been referred to after the first interview. The master's testimony as to his final conversations with Clarke before signing the contract is as follows:

"Q. You signed that contract after receiving the cable from the owners? A. I asked Mr. Clarke first whether he would take any less. He and I had several conversations on that; but he said he could not accept any less. The vessel was in danger of forming a bank of sand around her; and being advised likewise by Moller's agents that if the vessel stayed there much longer she was likely to form a bank, and the likelihood of not getting her off would be increased, I then signed the agreement with Captain Clarke after that transpired" (p. 243).

"Q. What conversations did you have with Clarke & Co., or any one representing them, about the price of the work that they were then proposing to do to float the vessel? A. I asked them if they would accept less.

Q. What did they say? A. *They told me that if the agreement was not settled they would have to give it up—if we did not come to terms they would have to give it up.*

Q. What terms? A. This $22,000.

Q. Did he give you any reason, or state why he had to give it up? A. He said that a bank might form around the ship, and it would cost more to float her; the risk would be greater.

Q. Who told you this? A. Mr. Clarke.

Q. Did you endeavor to solicit other people after receiving this cablegram that I quoted above? A. I saw Mr. Brock. That was the other party that tendered.

Q. What did he say about doing the work for a lesser price than $22,000? A. He would not do it.

Q. What did he say? A. He said he could not do it for less" (p. 205).

When it is considered that Clarke and Brock were the only salvors who, either alone or in combination, could do the work, as appears from the libelants' own evidence (*ante*, pp. 65-67), and that they not only declined to do it for less than $22,000, but practically threatened to charge more if the terms were not agreed to at once, it must have appeared to the master that he had no reasonable alternative but to accept. He was, therefore, as we submit, under that degree of compulsion which the courts have said releases him and the property from the binding force of his agreement (The *Don Carlos*, 47 Fed., 746, 748; the *Mark Lane*, 15 P. D., 135; the *Rialto*, 1891, Probate, 175; the *Shiedam*, 47 Fed., 923; the *Jenny Lind*, Newb., 443, 447-8; the *Tennasserim*, 47 Fed., 119; the *Sirus*, 15 U. S. App., 191).

(**d**.) The cable from the owners on October 12, instructing the captain to accept Clarke's tender of £4,580, "if lower were impossible" (Ex. D, p. 251), should not affect the case.

When that cable was sent, on October 12, at 3 P. M., the only information the owners had received of the stranding was contained in the captain's cables, dated the 7th, 8th, 10th, 11th and 12th of October (Bell, pp. 148, 149; and Exhibits Nos. 1, 2, 3, 4 and 5, pp. 157, 158; Burgess, Exhibits A, B, C, D and E, pp. 217, 218), and one telegram from Moller & Co., dated October 8 Bell, p. 150, Ex. 24, p. 163).

The captain's cables were as follows:

Exhibit A, dated October 7th (p. 217)—(translation):

"The ship grounded at the entrance of the harbor Friday. She is fast head and stern. *The ship is in a critical position.* Have sent for assistance. The ship was in charge of a Government pilot."

Exhibit B, dated October 8th (p. 217):

"Vessel same position. Lloyd's agent not arrived."

Exhibit C, dated October 9th (p. 218):

"Lloyds agent here. Have advertised for tenders to get the ship afloat on the principle of no cure, no pay. Put ship in Galveston, including diver. Lowest bid forty-five hundred and eighty pounds. Lloyd's and myself recommend acceptance. Vessel easy. Bottom sand one thousand feet from deep water."

Exhibit D, dated October 11th (p. 218):

"Delay will cause danger of sand banking, also increased cost of floating."

The master's letter, dated October 7th (Exhibit 25, p. 163), which the appellants intimate had been received by the owners before the ship was floated, actually did not reach them until October 20th (p. 151). Prior to the receipt of this letter they had understood from the master's cables that the vessel was in a critical position, as he said, and that the salvage work would accordingly be a heavy job (p. 151). This was shown by their instruction to the captain in the cable of October 12th to include a provision in the agreement that if the steamer, after coming off, was not worth the amount of the salvage she should be taken in payment.

On receiving this letter of the 7th it seemed materially to qualify the impression produced by his cables (Bell, p. 151). The owners had not been informed of the offer of the salvors to perform the service for what a court of admiralty would allow. If they had known of this, they would have accepted such mode of settlement (Bell, p. 150). They did not know that the steamer was lying head on to the beach, nor her draft, nor the depth of water in which she was lying, nor how much greater her draft would have been with her ballast out than the depth of the water in which she was lying, nor did they know to what extent sand was forming about her, or had formed about her, except as the captain cabled he feared that danger. If they had known the facts in regard to those matters they would not have authorized acceptance of the tender (Bell, p. 150). On receipt of the captain's letter, dated October 15th, saying, "To accept less was

impossible, salvors maintaining that vessel was every day getting into a more critical position on account of bank forming around her," and that "Lloyds agent at Galveston being a very old and feeble man, was not able to be present at the signing of the contract" (Exhibit 26th, p. 164). The owners felt "that the salvors or other interested persons had been taking advantage of the isolated position of Captain Burgess" (Bell, p. 151), and disaffirmed the contract.

Mr. Bell testified in the 11th interrogatory:

"If you had been informed that the vessel was lying easy on a sand bottom head on the beach, with hardly any perceptible accumulation of sand around her, in water not less than a foot shallower at one end of her than her draft would have been with her water ballast tanks empty, and that the weather was fine, with no immediate prospect of change, what would your judgment have been in regard to accepting the said tender of £4,580 made by the libelants for getting the steamer off? A. If I had known those facts I certainly would not have authorized the agreement for such a large sum" (p. 151–2).

In answer to the 13th interrogatory he further testified:

"I understand * * * that it has been proved, or will be proved, that the vessel was lying on a sand bottom head on the beach, with hardly any accumulation of sand around her, and that the weather was fine, with no immediate prospect of change, and the water where she lay was seven feet forward and nine feet aft, while her draft with the ballast pumped out would have been nine feet forward and n ne and a half feet aft. If this information be anything like the actual facts, it appears to me that the master had been willfully misled by the salvors or other interested persons; and that acting under false impressions conveyed to him as to the situation of the vessel and prospects of salving her, he unwittingly cabled me an erroneous view of the position. I have no hesitation in saying that had the maters referred to in the 9th and 11th interrogatories been known to me, I would certainly not have authorized acceptance of the tender" (p. 152).

It is to be observed, moreover, that the captain failed to carry out his instruction to accept £4,580 only "if lower impossible;" for on the same day, without waiting to see

Clarke, or making any other effort, so far as appears, to obtain lower figures, he telegraphed Sorley, Lloyd's agent: "Have received cable accept tender forty-five eighty" (Ex. 70, p. 171); and informed Morrisy of the terms of the cable, so that the latter telegraphed Moller on that day, "Pyman cables accept Clarke's bid. Tell him better get here quickly" (Exhibit 63, p. 190). Clarke learned of these telegrams from Sorley or Moller, or both (p. 35); and, knowing the limit of the captain's authority, peremptorily declined to accept less.

The captain had no other advice which should materially affect the case.

Mr. Sorley, Lloyds agent, was unable, by reason of age and infirm health, to give the master any material assistance. He was very ill and infirm at this time (pp. 63, 110, 111, 112), was only able to go to the ship once, and was not present when the contract was concluded (see Exhibit 26, p. 164). The captain had no agent. Moller & Co., who have been referred to as his agents, were really the charterers of the ship (Moller, p. 128; Burgess, 198), and Morrisy, who has been referred to as the ship's agent at Velasco, was Moller's agent (Moller, p. 128). No doubt the captain talked with pilots at Velasco and others; but an examination of the record will leave little doubt that the principal object of most, if not all, of them was to help their friend Clarke make money out of the ship.

(**e**.) The circumstances indicate a combination to secure the work for Clarke, and collusion between Brock and Clarke in the bidding, as well as some agreement for division of the salvage.

It has been shown (*ante*, p. 65) that Clarke and Brock were the only available salvors, and that Clarke had the necessary anchors but no barge to plant them with, while Brock had a barge but no anchors. It was represented to the captain, and appears to have been the fact, that Clarke and Brock were the only salvors who could do the work; and he was advised against applying elsewhere for assistance (p. 213). Brock was the first to reach the ship after her stranding, and did some work before Clarke reached her. As soon as the charterers, Moller & Co., were ad-

vised of the stranding, they cast their influence with the master in favor of Clarke, telegraphing their Velasco agent, Morrisy, on October 7th, as follows:

"Clarke's tug, with hawser, gone Elfrida's assistance. Recommend Charles Clarke solely attend matter, he being very practical wrecker" (Exhibit 10, p. 183).

Morrisy told Captain Burgess of this recommendation (pp. 59, 60), and telegraphed back to Moller on the same day, "Think Elfrida will accept Clarke" (Exhibit 15, p. 184). Clarke went to Velasco October 7th (p. 44), and at once began negotiations with the captain (pp. 32, 33). This brought the following telegrams from Brock:

To Moller:

"I have been on ground and rendered assistance to Elfrida, running anchors, &c. Why shut me out altogether? Am able to furnish plant" (Ex. 18, p. 184).

Also a telegram to Beers & Co., of Galveston:

"If you are Lloyds' agents why not let me work on Elfrida as well as any other person? I was on ground and ran anchors out before Seminole (Clarke's tug) came" (Exhibit 19, p. 184).

Also this telegram to James Sorley, Lloyds' agent at Galveston:

"I have already rendered assistance to steamship Elfrida. Before you close with others give me a chance" (Exhibit 20, p. 184).

Brock's efforts to head off Clarke's negotiations were stopped by the following telegram from Moller to Morrissy, October 8th:

"Inform Brock privately as master of Elfrida called for assistance we could not help sending Clarke, who had only tug boat available. We have no objection to Brock continuing assisting Elfrida *making his own bargain* so long as White Jacket attended to" (Ex. 8, p. 183).

Brock also told Morrisy "that he did not want to be shut out" (p. 61). But after Morrisy showed him Moller's telegram just quoted (p. 61) Brock made no further efforts

of any kind to be employed in the salvage service in competition with Clarke.

When the captain applied for tenders he received only two bids, one from Clarke and one from Brock (p. 242). Clarke's bid was $22,000 and Brock's $24,000. Subsequently, when Clarke's figures were made known to Brock he declined to bid under them (p. 205). Brock died before the case came on for trial.

When the work came to be done it was found that the anchors were planted from Brock's barge, which Clarke claims he hired.

"Q. When did you hire the lighter from Brock? A. It was the day I arrived there, the 14th, I think, *before the contract was signed*" (p. 37).

Clarke admits that he had eight of Brock's men as well as Brock's lighter (p. 38); and that he engaged Brock to assist in the work, telling him he would pay him for assistance, but without agreeing upon any terms except for the hire of the lighter (p. 38). During the service Brock was on the Elfrida, and Clarke on the tug (p. 226). It was Brock who ordered the ballast discharged before the winches were started to haul the ship off (pp. 212, 213). After the vessel was afloat Brock telegraphed to Clarke, who had returned to Galveston, "Captain goes to Galveston to-morrow. Get papers and see ship." Clarke accounts for that interest by saying "I owed him for helping me on the ship. He certainly did not work for nothing" (p. 144). And on October 25th, Brock informed Clarke, "Ship seized" (p. 189).

Moller took the stand and denied any collusion with Clarke. The following facts, however, appeared. They show at least that the relations were those of extreme friendship.

Moller agreed, in order to give Clarke an opportunity to libel the ship, to detain her at Velasco after she was afloat, and telegraphed his agent Morrisy to that effect (p. 137). When Clarke was ready to go he telegraphed Moller to have Mr. Wilson, who was Moller's father in law (p. 137) "get papers ready, seize *Elfrida*" (Exhibit 51, p. 188). Subsequently, during the examination of wit-

nesses before the Clerk, Clarke interrupted the proceedings and declared that he had never employed Wilson to represent him; but the Clerk stated that Mr. Wilson had been employed by Moller, and the examination then proceeded (pp. 240, 241 and 28). It is also to be observed that Moller was one of the sureties on the libelant's stipulation for costs (p. 4).

Though these circumstances may fall short of absolute proof of collusion, they at least afford evidence of a combination of those in touch with the captain to secure the work for Clarke, and to leave matters in such shape that he could impose his own terms. They are significant enough, taken in connection with the other facts of the case, to justify the conclusion of the Court of Appeals that in negotiating the contract the master and Clarke were not on the same footing.

VI.

The decision of the Court of Appeals should be affirmed, with costs.

NEW YORK, November 9, 1898.

Respectfully submitted,

CONVERS & KIRLIN,
Proctors for *Elfrida*.

J. PARKER KIRLIN,
Advocate.

THE ELFRIDA.[1]

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 60. Argued November 10, 11, 1898. — Decided December 12, 1898.

Where the stipulated compensation in a salvage contract is dependent upon success it may be made for a larger compensation than a *quantum meruit* and much more so when such success is to be achieved within a limited time; and such contract, after execution, will not be set aside simply because the compensation is excessive, unless shown to have been corruptly entered into, or made under fraudulent representations, a clear mistake or suppression of important facts, in immediate danger to the

[1] The docket title of this case is "Charles Clarke and Robert P. Clarke, Petitioners, *v.* The Steamship Elfrida, Pyman, Bell & Co., Claimants."

Statement of the Case.

ship, or under other circumstances amounting to compulsion, or when its enforcement would be contrary to equity and good conscience.

Many leading cases in this country and some in England, where salvage contracts have been set aside, and compensation awarded in proportion to the merits of the services, examined, and shown to establish (1) That the courts of both countries are in entire accord in holding that a contract of salvage, which the master has been corruptly or recklessly induced to sign, will be wholly disregarded; (2) that some of the American courts have also laid down the rule that all salvage contracts are within the discretion of the court, and will be set aside in all cases where, after the service is performed, the stipulated compensation appears to be unreasonable, to which this court is unable to give its assent; (3) that while in England there has been some slight fluctuation of opinion, by the great weight of authority, and particularly of the more recent cases, it is held that if the contract has been fairly entered into, with eyes open to all the facts, and no fraud or compulsion exists, the mere fact that it is a hard bargain, or that the service was attended with greater or less difficulty than was anticipated, will not justify setting it aside.

Where no circumstances exist which amount to a moral compulsion, such a contract should not be held bad simply because the price agreed to be paid turned out to be much greater than the services were actually worth.

On the continent of Europe the courts appear to exercise a wider discretion, and to treat such contracts as of no effect if made when the vessel is in danger, but this court cannot accept this as expressing the true rule on the subject.

The facts relating to the making of the contract which is in dispute in this case, as detailed in the opinion of the court, show that few cases are presented showing a contract entered into with more care and prudence than this, and the court is clear in its opinion that it should be sustained.

THIS was a libel *in rem* by the firm of Charles Clarke & Co., of Galveston, Texas, against the British steamship Elfrida, to recover the sum of $22,000, with interest and costs, claimed to be due them for services rendered in the performance of a salvage contract with the master, to release the Elfrida, then stranded near the mouth of the Brazos River.

The principal averments of the answer were, in substance, that the agreement was signed by the master under a mutual mistake of fact, or by mistake on his part, which libellants took advantage of, as to the danger in which the vessel was, and that it was improvidently made for an excessive com-

pensation without a proper understanding by him of the vessel's alleged freedom from danger; that the master had been prevented from carrying out his instructions to accept a tender made, if lower impossible, by information of the cable being conveyed to the salvors before the master saw it; that the parties were not upon an equal footing; that libellants made an unreasonable bargain with the master because of the stress of the situation and that of his vessel, and acted collusively with other salvors in obtaining from him the agreement.

On Friday, October 5, 1894, the Elfrida, a steel steamship of 1454 tons register, 290 feet long, 38 feet in width, and drawing 11 feet 10 inches, bound for the port of Velasco, Texas, in ballast, grounded on the bar between the jetties which extend from either bank of the river, about a mile into the Gulf, the outer end of these jetties for a distance of a thousand feet or more being submerged. The heel of the ship touched, there being but five inches between the bottom and the bar, and an easterly wind swung her bow against the west jetty. The captain ran out a kedge from the starboard bow, hove taut with the windlass, put the engine full speed astern, but could not move the ship. The wind and sea increased during the afternoon and evening, while the ship was straining and bumping heavily. The weather moderated somewhat on the following day, and the same efforts were continued unsuccessfully until the evening, when the sea rose, carrying her over the submerged outer end of the jetty, and some distance farther shoreward on the beach. She brought up that night about a cable's length to the west of the west jetty. That part of the jetty which was above high water projected seaward beyond her stern and sheltered her from easterly winds. She lay parallel with the jetty about four or five hundred feet from the beach, head on, and about one thousand feet from water of sufficient depth to float her. The shore at this point is very flat, the bottom consisting of a layer of quicksand about ten feet deep. The steamer settled in the quicksand to her normal draft, rocking and moving in it whenever there was a high

sea. She lay in nine feet of water at high tide. The weather continued generally favorable from the 7th to the 17th, with occasional gales and high seas. The ship drifted somewhat further on the beach, but efforts to relieve her by her own resources seem to have been practically abandoned.

On Tuesday, October 9, the master sent the following letter to the libellants:

"Velasco, *Oct.* 9, 1894.

"Capt. Chas. Clarke, re S.S. Elfrida.

"Dear Sir: Please tender for to float and place in a place of safety, say Galveston, where her bottom can be examined, furnishing diver and his apparatus. Also to furnish all material and labor in floating said steamship Elfrida, also time required. Reply at your earliest convenience under seal to Jas. Sorely, Lloyds agent, or myself.

"No cure, no pay.

"Yours truly, By B. Burgess, *Master.*

"P.S. — A convenient time to be laid to get the ship off, and if at the expiration of the time the vessel is still aground, all claim on this contract to cease and to be null and void.

"B. Burgess, *Master.*"

In reply to this, libellants submitted a tender, offering to perform the service for the sum of $22,000, which was accepted by the advice of Lloyds' agent, who was on board the vessel at the time, and with the consent of Pyman, Bell & Co., of Newcastle-on-Tyne, owners of the Elfrida.

The following contract, which forms the basis of the present suit, was thereupon entered into:

"The State of Texas, }
County of Brazoria. }

"This agreement, made and entered into this 15th day of October, 1894, between the steamship Elfrida, and the owners thereof, represented herein by B. Burgess, master of said steamship, as party of the first part, and Charles Clarke & Co., of Galveston, Texas, as party of the second part,

"Witnesseth, that for and in consideration of the covenants

and agreements herein contained on the part of the said party of the first part, to be kept and performed, the said party of the second part hereby agrees and binds himself, his administrators and assigns, to float and place in a safe anchorage, Quintana or Galveston, as directed, the S.S. Elfrida, which is now stranded west of and near to the west jetty at the mouth of the Brazos River, in said county and State; to furnish all labor and material at the cost of said party of the second part, and to furnish diver and necessary apparatus to survey or examine the bottom of said steamship, and to complete the same within twenty-one (21) days from date hereof.

"The said party of the first part agrees to pay to the said party of the second part for such service, *i.e.* when he shall have successfully floated said ship, as above set forth, the sum of twenty-two thousand dollars ($22,000). The said party of the first part, however, reserving the right hereby to abandon the ship to and in favor of the said second party in lieu of the amount of $22,000 agreed to be paid as aforesaid.

"It is further understood and agreed by and between the parties hereto that a failure to float and place in a position of safety, as above stated, said steamship within the time hereinbefore specified, to wit, twenty-one days from date hereof, that said party of the second part shall receive no compensation whatever from said first party for work performed, labor, tools or appliances furnished.

"Anything that may be discharged to enable vessel to float shall be replaced when she is in a position of safety. It is also agreed and understood that the use of crew and engine shall be at the use and disposal of said party.

"Witness the hand of B. Burgess, master of the steamship Elfrida, for himself, said ship and the owners, party of the first part, and the hand of Charles Clarke & Co., party of the second part, this 15th day of October, 1894.

"Benj. Burgess.

"Witnesses: "Chas. Clarke & Co.

"M. P. Morrissey.

"J. H. Durkie,

"*Master S.S. Lizzie, of Whitby.*"

Statement of the Case.

The day before the contract was signed, the libellants, having learned that their tender for the work had been accepted, hired the schooner Louis Dolsen of fifteen tons, for which they paid $100, to take their plant to Galveston in tow of their tug Josephine. They also hired a large force of men, procured nearly a month's supplies, cables, chains, anchors, two tugboats, two lighters and two schooners, fully manned and equipped. Some of this plant belonged to them, but the schooners and lighters and their equipments were hired. For one of the lighters they agreed to pay $6500 if she should be lost. Their entire outfit was worth from $30,000 to $50,000. On arriving at Velasco on the same or following day, they engaged a derrick lighter for use in laying the anchors, and on the two following days, the 16th and 17th, the salvors were at work planting the anchors and connecting cables from them to the winches of the ship. This work was completed during the afternoon of the 17th, the water ballast pumped out, when the Elfrida's engines, winches and windlass were started by her own steam, and in less than half an hour she began to move herself off. She went slowly for the distance of about a thousand feet when she floated clear, but was carried by the current against the west jetty. The libellants' tug then for the first time took hold of her and towed her away from the jetty, and at 7.40 P.M., four hours after the work of hauling her off was begun, she was free and clear of everything, and put to sea under control of the pilot. Subsequent examination of her bottom, in the dry dock at Newport News, showed that she was wholly uninjured except for a slight indentation about a foot long in the bilge, which was probably caused by contact with the jetty. At the time she was stranded she was insured for the sum of £18,000, subsequently reduced to £16,000.

Upon a full hearing upon pleadings and proofs, the District Court entered a final decree in favor of the libellants for the stipulated sum of $22,000, with interest and costs. Claimants appealed to the Circuit Court of Appeals, which reversed the decree of the District Court, one judge dissent-

ing, and remanded the case with instructions to enter a decree in favor of libellants for the sum of $10,000, with interest at six per cent. 41 U. S. App. 585. A petition for rehearing having been denied, libellant applied to this court for a writ of certiorari, which was granted.

Mr. James B. Stubbs for Clarke et al. *Mr. Charles J. Stubbs*, *Mr. Joseph H. Wilson* and *Mr. Henry M. Earle* were on his brief.

Mr. J. Parker Kirlin for the Elfrida.

Mr. Justice Brown, after stating the case, delivered the opinion of the court.

But a single question is presented by the record in this case: Was the contract with the libellants of such a character, or made under such circumstances, as required the court to relieve the Elfrida against the payment of the stipulated compensation?

We are all of opinion that this question must be answered in the negative. Salvage services are either (1) voluntary, wherein the compensation is dependent upon success; (2) rendered under a contract for a *per diem* or *per horam* wage, payable at all events; or (3) under a contract for a compensation payable only in case of success.

The first and most ancient class comprises cases of pure salvage. The second is the most common upon the Great Lakes. The third includes the one under consideration. Obviously where the stipulated compensation is dependent upon success, and particularly of success within a limited time, it may be very much larger than a mere *quantum meruit*. Indeed, such contracts will not be set aside unless corruptly entered into, or made under fraudulent representations, a clear mistake or suppression of important facts, in immediate danger to the ship, or under other circumstances amounting to compulsion, or when their enforcement would be contrary to equity and good conscience. Before advert-

ing to the facts of this particular case, it may be well to examine some of the leading authorities where salvage contracts have been set aside and compensation awarded in proportion to the merit of the services.

In the case of *The North Carolina*, 15 Pet. 40, the master of a vessel which had struck upon one of the Florida reefs was improperly, if not corruptly, induced to refer the amount of salvage to the arbitrament of two men, who awarded thirty-five per cent of the vessel and cargo. The court found that under the circumstances the master had no authority to bind his owners by the settlement; that the settlement was fraudulently made, and that the salvors, by their contract, had forfeited all claims to compensation even for services actually rendered.

In *The Tornado*, 109 U. S. 110, the owners of three steam tugs which had pumping machinery were employed by the master and agent of a ship sunk at a wharf in New Orleans, with a cargo on board, to pump out the ship for a compensation of $50 per hour for each boat, "to be continued until the boats were discharged." When the boats were about to begin pumping, the United States marshal seized the ship and cargo upon a warrant on a libel for salvage. After the seizure the marshal took possession of the ship and displaced the authority of the master, but permitted the tugs to pump out the ship. After they had pumped for about eighteen hours, the ship was raised and placed in a position of safety. The tugs remained by the ship, ready to assist her in case of need, for twelve days, but their attendance was unnecessary, and not required by any peril of ship or cargo. In libels of intervention, in the suit for salvage, the owners of the tugs claimed each $50 per hour for the whole time, including the twelve days, as salvage. The court held that as the contract was to pump out the ship for an hourly compensation, the right of the steam tugs to compensation must be regarded as having terminated when the ship and cargo were raised, and that, as the marshal seized the ship as the tugs began to pump her out, the authority of the master was displaced, and the boats must be regarded as having been discharged under any fair

interpretation of the contract. Standing by for a period of twelve days was found to have been unnecessary, and not required by any peril to the Tornado or her cargo. The case was not one where the contract was set aside as inequitable, though found to be so, but where it had been completed by pumping out the ship and the supersession of the master. See, also, *Bondies* v. *Sherwood*, 22 How. 214, where the court overruled an attempt on the part of the salvors to repudiate their contract as unprofitable and recover on a *quantum meruit*.

These are the only cases in our reports in which the question of nullifying a salvage contract was squarely presented, although there is in the case of *Post* v. *Jones*, 19 How. 150, 160, an expression of the court to the effect that "courts of admiralty will enforce contracts made for salvage service and salvage compensation, where the salvor has not taken advantage of his power to make an unreasonable bargain; but they will not tolerate the doctrine that a salvor can take the advantage of his situation, and avail himself of the calamities of others to drive a bargain; nor will they permit the performance of a public duty to be turned into a traffic of profit." Indeed, it may be said in this connection that the American and English courts are in entire accord in holding that a contract which the master has been corruptly or recklessly induced to sign will be wholly disregarded. *The Theodore*, Swabey, 351; *The Crus*, V. Lush. 583; *The Generous*, L. R. 2 Ad. 57, 60.

The intimations of this court have been followed except in very rare instances by the subordinate courts. Thus, in the case of *The Agnes I. Grace*, 49 Fed. Rep. 662; *S.C.* 2 U. S. App. 317, a schooner bound for Port Royal, South Carolina, put into Tybee Roads under stress of weather. She came up on the sands in an exceedingly perilous condition. The ground was treacherous and dangerous, and while lying there she was exposed to the full force of the sea and winds. A tow boat company offered its services, and a contract was entered into to pay the sum of $5000 as salvage. A portion of the cargo, amounting to $7000, was saved, as well as the

schooner, which was sold for $5030, probably about one half her value. The contract was sustained. The court put its decision upon the ground that the case could not be considered as belonging to that class "where the master being upon the high seas or an uninhabited coast, at a distance from all other aid, is absolutely helpless and without power to procure assistance other than that offered, and is compelled in consequence to make a hard and inequitable contract. He was within easy reach of Savannah, where, had he desired to assume the risk for his owners, he could have procured lighters and other tugs to render the service."

The cases in these courts are too numerous for citation, but it is believed that in nearly all of them the distinction is preserved between such contracts as are entered into corruptly, fraudulently, compulsorily or under a clear mistake of facts, and such as merely involve a bad bargain, or are accompanied with a greater or less amount of labor, difficulty or danger than was originally expected.

In the earliest of these, (1799,) *Cowell* v. *The Brothers*, Bee's Ad. 136, the libellant very properly relinquished his written agreement and applied to the court for such compensation as his services appeared to deserve, although the court expressed the opinion that the contract would have been held void as having been made under circumstances of great distress. To the same effect is *Schutz* v. *The Nancy*, Bee's Ad. 139.

In the case most frequently cited, *The Emulous*, 1 Sumn. 207, the parties treated the contract at an end on account of unexpected difficulties, but Mr. Justice Story expressed the opinion that salvage contracts were within control of the court, and that the salvor could not avail himself of the calamities of others to force upon them a contract unjust, oppressive or exorbitant. In the subsequent case of *Bearse* v. *Pigs of Copper*, 1 Story, 314, Mr. Justice Story found that no fixed or definite contract for the services existed, although he had previously remarked that it was "one of the few and excepted cases in which there may be a private contract fixing the rate of salvage, which will be, and ought to be, obligatory between

the parties." We do not think that a salvage contract should be sustained as an exception to the general rule, but rather that it should, *prima facie*, be enforced, and that it belongs to the defendant to establish the exception. *The A. D. Patchin*, 1 Blatch. 414; *Harley* v. *467 Bars Iron*, 1 Sawyer, 1; *The R. D. Bibber*, 33 Fed. Rep. 55; *The Wellington*, 48 Fed. Rep. 475; *The Sir Wm. Armstrong*, 53 Fed. Rep. 145; *The Alert*, 56 Fed. Rep. 721; *The Silver Spray's Boilers*, Brown's Ad. 349.

In *The H. D. Bacon*, Newberry's Ad. 274, certain salvors, by the use of their machinery and diving bell worth $20,000, raised a badly sunken steamboat in the Mississippi, valued $20,000, in twelve hours. It was held that the contracted price of $4000 was just and reasonable.

In *The J. G. Paint*, 1 Ben. 545, an agreement to pay a steamboat $5000 for towing a vessel worth $8000, with a cargo of sugar, for twenty-seven hours, was sustained by Judge, subsequently Mr. Justice, Blatchford.

In most of the cases where the contract was held void the facts showed that advantage was taken of an apparently helpless condition to impose upon the master an unconscionable bargain. *Brooks* v. *Steamer Adirondack*, 2 Fed. Rep. 387; *The Young America*, 20 Fed. Rep. 926; *The Don Carlos*, 47 Fed. Rep. 746.

It must be admitted that some of these courts have exercised a wide discretion in setting aside these contracts, and have laid down the rule that they are to be closely scrutinized, and will not be upheld when it appears that the price agreed upon by the master is unreasonable or exorbitant. We do not undertake to say that these cases were improperly decided upon their peculiar facts, but we are unable to assent to the general proposition laid down in some of them that salvage contracts are within the discretion of the court, and will be set aside in all cases where, after the service is performed, the stipulated compensation appears to be unreasonable. If such were the law, contracts for salvage services would be of no practical value, and salvors would be forced to rely upon the liberality of the courts.

Nor is such a contract objectionable, when prudently en-

tered into, upon the ground that it may result more or less favorably to the parties interested than was anticipated when the contract was made. A person may lawfully contract against contingencies; in fact, the whole law of insurance is based upon the principle that, by the payment of a small sum of money, the insured may indemnify himself against the possibility of a greater loss; or, by the expenditure of a trifling amount to-day in the way of premium, his family may receive a much larger sum in case of his subsequent death. If there were ever any doubt with respect to the validity of such contracts it was long since removed by the universal concurrence of the courts, and an enormous business has grown up all over the world upon the faith of their validity. Indeed, nearly every contract for a special undertaking or *job* is subject to the contingencies of a rise or fall in the price of labor or materials, to the possibility of strikes, fires, storms, floods, etc., which may render it unexpectedly profitable to one party or the other.

We do not say that to impugn a salvage contract such duress must be shown as would require a court of law to set aside an ordinary contract; but where no such circumstances exist as amount to a moral compulsion, the contract should not be held bad simply because the price agreed to be paid turned out to be much greater than the services were actually worth. The presumptions are in favor of the validity of the contract, *The Helen & George*, Swabey, 368; *The Medina*, 2 P. D. 5, although in passing upon the question of compulsion the fact that the contract was made at sea, or under circumstances demanding immediate action, is an important consideration. If when the contract is made the price agreed to be paid appears to be just and reasonable in view of the value of the property at stake, the danger from which it is to be rescued, the risk to the salvors and the salving property, the time and labor probably necessary to effect the salvage, and the contingency of losing all in case of failure, this sum ought not to be reduced by an unexpected success in accomplishing the work, unless the compensation for the work actually done be grossly exorbitant.

While in England there has been some slight fluctuation of opinion, by the great weight of authority, and particularly of the more recent cases, it is held that if the contract has been fairly entered into, with eyes open to all the facts, and no fraud or compulsion exists, the mere fact that it is a hard bargain, or that the service was attended with greater or less difficulty than was anticipated, will not justify setting it aside. *The Mulgrave*, 2 Hagg. Ad. 77; *The True Blue*, 2 W. Rob. 176; *The Henry*, 15 Jur. 183; *S.C.* 2 Eng. Law and Eq. 564; *The Prinz Heinrich*, 13 P. D. 31; *The Strathgarry*, (1895) P. D. 264.

In *The Kingalock*, 1 Spinks, 263, an agreement was set aside upon the ground that when the vessel was taken in tow the master concealed the fact that she had been compelled to slip an anchor and cable, and that her foresail was split. Dr. Lushington thought that whether the omission to state those facts would vitiate the agreement depended upon whether they could, with any reasonable probability, affect the services about to be performed. He found that the weather was very tempestuous and the task was made much more difficult for the want of ground tackle, and hence that the agreement was null and void. *Per contra*, in the case of *The Canova*, L. R. 1 Ad. 54, he held that as no danger to property was proved, the agreement would not be set aside by reason of the fact that a great part of the crew of the vessel was disabled by illness.

In *The Phantom*, L. R. 1 Ad. 58, an agreement for eight shillings six pence, as an award for salvage services, was set aside as futile, where it appeared that there was real danger to the salvors in rendering the services. The value of the Phantom was about seven hundred pounds. The case was certainly a very hard one upon the salvors, who appeared to have been ignorant beachmen. But it is somewhat difficult to reconcile that with the prior case of *The Firefly*, Swabey, 240, where the court distinctly held that it would not set aside a salvage agreement because it seemed to be a hard bargain; or that of *The Helen and George*, Swabey, 368, unless proved to be grossly exorbitant, or to have been ob-

tained by compulsion or fraud. It was also held in *The Waverley*, L. R. 3 Ad. 369, that a steamer which contracts to render salvage services for a fixed sum will be held strictly to her agreement, and that it is no ground for extra salvage remuneration that the service was prolonged or became more difficult. See also *The Jonge Andries*, Swabey, 303.

In the *Cargo ex Woosung*, 1 P. D. 260, it appeared that the ship was wrecked on a reef in the Red Sea, and was in a position of imminent peril, and subsequently went to pieces. A government vessel was sent to her relief from Aden, and the master of the Woosung, "under circumstances of enormous pressure," agreed to pay half of the proceeds of the cargo saved. The agreement was upheld by the admiralty court (Sir Robert Phillimore), but was set aside by the Court of Appeal upon the ground that the officers of government ships, while entitled to salvage, could not impose terms upon the persons whose property they saved, and refuse to render assistance unless these terms were accepted. The circumstances showed a clear case of compulsion. So, too, in *The Medina*, 1 P. D. 272; *S.C.* 2 P. D. 5, where the master of a vessel found passengers of another steamer, (550 pilgrims,) wrecked on a rock in the Red Sea in fine weather, and refused to carry them to Jeddah for a less sum than four thousand pounds, and the master of the wrecked vessel was by such refusal compelled to sign an agreement for that sum, and the service was performed without difficulty and danger, the agreement was held inequitable and set aside. The compulsion in this case was even clearer than in the last.

In *The Silesia*, 5 P. D. 177, a vessel which with her cargo and freight was valued at £108,000 on a voyage from New York to Hamburg, became disabled about 340 miles from Queenstown. The weather was fine and the sea smooth, but after tossing about for four or five days, she hoisted signals of distress. Another steamer bore down upon her bound from Antwerp to Philadelphia, and demanded £20,000 to take her to Queenstown. The master of the Silesia offered £5000, and finally agreed to pay £15,000, under threat of the other steamer to leave him. The service occupied three days.

The court set aside the agreement as exorbitant, and awarded £7000. Evidently advantage was taken of the helpless condition of the Silesia, and the agreement was signed under compulsion.

In *The Prinz Heinrich*, 13 P. D. 31, the master of the Prinz Heinrich, which was in a position of serious danger, and ashore upon a barbarous and thinly inhabited coast, entered into a written agreement with the master of the salving steamer, whereby he agreed to pay £200 a day for every day the latter stood by and assisted by towing to get the Prinz Heinrich off, and in the event of her being got off, or coming off the rocks during the continuance of the agreement, to pay £2000 in addition. The Prinz Heinrich came off the same day, either owing to the jettison of her cargo or to the towing of the salving steamer. The court held the agreement to be reasonable, and that the salvors were entitled to recover the full £2200, although the Heinrich was so much damaged that she was subsequently sold for £3500. The cargo was valued at £14,000. This is a strong case in favor of sustaining the agreement.

In *The Mark Lane*, 15 P. D. 135, a steamer becoming disabled in the Atlantic Ocean in fine weather, about 350 miles from Halifax, agreed to pay another steamer £5000 to tow her to Halifax, and in case of failing in the attempt to reach there, to pay her for the services rendered. The value of the property saved was somewhat less than £30,000. The contract was set aside, apparently because of the stipulation in the agreement to pay for the services rendered, even if they were unsuccessful. The court found the contract to have been signed under compulsion and threat of the salvage steamer to leave her if the master refused.

In *The Rialto*, (1891) P. D. 175, a steamer in the Atlantic fell in with another which had broken her main shaft. Her master thereupon entered into an agreement that the owner should pay £6000 for being towed to the nearest port, believing that unless he consented to such terms the salvors would not assist. The distance towed was about 450 miles, and the value of the saved property £38,000. The weather was fine

when the contract was made. There was no serious risk to the salvors or their vessel. The court found the contract to be inequitable, that the parties stood on unequal terms, and reduced the amount to £3000.

The most recent case in the English courts is that of *The Strathgarry*, (1895) P. D. 264. In this case a master of a vessel, whose cylinders were disabled, entered into an agreement with a passing steamship to pay £500 for half an hour's towage, in order to get his engines to work. The hawser broke immediately after the completion of the agreed time, and the steamship refused to continue the towage. It was held that although no benefit had resulted from the service, the agreement had been duly carried out, and that it was not, under the circumstances, manifestly unfair and unjust, and therefore the stipulated sum must be paid. The case was certainly a hard one, but the court held that, notwithstanding the services lasted but thirty minutes, the whole £500 should be paid.

In none of these cases, except perhaps that of *The Phantom*, was the agreement set aside except upon proof of corruption, suppression of facts, or circumstances amounting to a compulsion. In the case of *The Phantom* the circumstances were peculiar. The salvors were seven ignorant longshoremen, who agreed for a consideration which amounted to but little more than a shilling apiece to undertake the salving of a vessel worth £700. The salvors labored for two hours at great risk of their lives, and the court naturally held the consideration to be merely nominal.

Under the continental system the courts appear to exercise a wider discretion, and to treat contracts as of no effect when made while the vessel is in danger. Some intimations go so far as to say that they will be disregarded whenever made before the services are rendered. The doctrine of these courts seems to have arisen from the following extract from the fourth article of the Rules of Oleron:

"And yf it were so, that the mayster and the marchauntes have promised to folke, that shuld helpe them to save the shyp and the said goodes, the thyrde parte or half of the said goodes which shuld be saved for the peryll that they be in,

the justyce of the country ought well to regarde what payne and what labour they have done in saving them, and after that payne, notwithstanding that promise which the said mayster and the marchauntes shall have made, rewarde them. This is the judgement."

By the German Commercial Code, art. 743, it is enacted that "when during the danger an agreement has been made as to the amount of salvage or payment for assistance, such agreement may nevertheless be disputed on the plea that the amount agreed upon was excessive, and the reduction of the same to an amount more in accordance to the circumstances of the case may be demanded."

Under the Scandinavian Code, art. 27, the master may, within two months, bring the question of contract before the court, which can refuse the amount if considerably in excess of a reasonable payment for the services performed. Even if it be agreed that the amount be settled by arbitration, the person liable to pay may repudiate the agreement if he does so within fourteen days.

By the Commercial Code of Holland, art. 568, every agreement or transaction regarding the price of assistance or of salvage may be modified or annulled by the judge, if it has been made in the open sea or at the time of stranding. Nevertheless, when the danger is passed, it shall be lawful for both to make regulations or agreements as to the price of assistance or salvage.

By the Commercial Code of Portugal, art. 1608, and by that of the Argentine Republic, sec. 1469, every agreement for salvage made upon the high seas, or at the time of stranding, with the captain or other officer, shall be null, both with respect to the vessel and to the cargo; but after the risk has terminated the price may be agreed upon, although it will not be binding upon the owners, consignees or underwriters who have not consented to it.

The French, Belgian, Italian, Spanish and Brazilian Codes have no special provisions upon the subject, and the question of sustaining or annulling them is rather a question of fact than of law.

We have examined the cases cited by counsel in the Revue Internationale de Droit Maritime, and find that they are more favorable to the respondent than the English and American authorities. In short, they appear to pay much less regard to the sanctity of contracts than obtains under our system, and we are loath to accept them as expressing the true rule upon the subject. Indeed, we have had frequent occasion to hold that the maritime usages of foreign countries are not obligatory upon us, and will not be respected as authority, except so far as they are consonant with the well-settled principles of English and American jurisprudence. *The John G. Stevens*, 170 U. S. 113, 126, and cases cited.

The facts in this case are somewhat peculiar, and, in entering into the contract, unusual precautions were taken. On October 5, the Elfrida in entering the river grounded by the stern about mid-channel, her bow drifting over toward the west jetty. Her crew were unable to get her off, either upon that or the following day, when, owing to the sea rising, she was carried over the jetty and a very considerable distance further on to the beach (about 600 feet), where she remained in seven or eight feet of water, gradually working inward and making a bed for herself in the sand, which had a tendency to bank up about her bows. She appears to have been at no time in imminent peril, but her situation could have been hardly without serious danger, unless she were released before a heavy storm came on, which might have broken her up or driven her so far ashore that her rescue would have been impossible. It was shown that in previous years a number of vessels had gone ashore in this neighborhood, several of which were lost by bad weather coming on. In other cases the difficulty of getting them off had been very largely increased by similar causes. The testimony shows that while the Elfrida lay there the wind was at times blowing a gale with a rough sea, in which the ship strained and bumped heavily. On Saturday the 6th, the day of her final stranding, the master having given up his idea of getting her off with her own anchors, telegraphed his owners and also Lloyds' agent at Galveston, who appear to have sent Mr. Clarke, one of the libellants,

down on Sunday evening. He offered to undertake the relief of the ship for what the court would allow him. This offer the master declined. About the same time Mr. Sorley, Lloyds' agent, came down to the vessel, saw her situation, remained there two days, and advised the master to invite bids for her relief. He obtained two bids, one for $24,000 and one made by the libellants for $22,000, and on the advice of Sorley and of his owners, Pynam, Bell & Co., of Newcastle-on-Tyne, with whom he kept in constant communication by cable, he accepted libellants' bid, and a contract was entered into, whereby they agreed to float the Elfrida and place her in a safe anchorage, and to complete the job within twenty-one days from date. The master agreed to pay therefor the sum of $22,000, but reserved the right to abandon the ship in lieu of this amount. At the request of the owners he also inserted a further stipulation that if the libellants should fail to float the ship and place her in a position of safety within twenty-one days, they should receive no compensation whatever for the work performed, or the labor, tools or appliances furnished. This contract was made at Velasco on October 15. Clarke proceeded at once to get ready a wrecking outfit, consisting of a tugboat and schooner, with fifteen or sixteen men, went to the wreck, and spent about two days planting anchors and connecting cables from them to the winches of the ship. The tugboat took no part in the actual relief of the vessel, which was effected by the aid of the anchors and the steamer's engines, although after the Elfrida was afloat she drifted against the west jetty and the tug hauled her off.

For the work actually done the stipulated compensation was undoubtedly very large, and if the validity of the contract depended alone upon this consideration, we should have no hesitation in affirming the decree of the Circuit Court of Appeals; but the circumstances under which the contract was made put the case in a very different light. In the first place, the libellants offered to get the vessel off for such salvage as the court should award, but the master declined the proposition, and, acting under the advice of Lloyds' agent and of Moller & Co., the owners' agents at Galveston, invited bids

for the service. This certainly was a very proper step upon his part, and there is no evidence showing any collusion between the bidders to charge an exorbitant sum. The conditions imposed upon the libellants were unusual and somewhat severe. Their ability to get her off must have depended largely upon the continuance of good weather. Their ability to get her off within the time limited was even more doubtful, and yet under their contract they were to receive nothing — not even a *quantum meruit* — unless they released her and put her in a place of safety within twenty-one days. Further than this, if in getting her off, or after she had been gotten off, she proved to be so much damaged that she was not worth the stipulated compensation, the master reserved the right to abandon her.

We give no weight to the advice of Pynam, Bell & Co., her owners, to enter into the contract, since in the nature of things they could have no personal knowledge of her situation, or of the possibility of relieving her; but it shows that her master, though a young man and making his first voyage as master, acted with commendable prudence. He took no step without the advice of his owners and that of the underwriters' agent at Galveston, Mr. Sorley, who was a man over seventy years of age, perfectly honest, and of large experience in these matters. Sorley visited the vessel, saw her situation, and advised an acceptance of the bid. The value of the ship is variously estimated at from $70,000 to $110,000, but the sum for which she was insured, £18,000 or $90,000, may be taken as her approximate value. Under the stringent circumstances of this contract, we do not think it could be said that an agreement to pay one quarter of her value if released could be considered unconscionable, or even exorbitant, and unless the fact that it proved to be exceedingly profitable for the libellants is decisive that it was unreasonable, it ought to be sustained. For the reasons above stated we think that the disproportion of the compensation to the work done is not the sole criterion. Very few cases are presented showing a contract entered into with more care and prudence than this, and we are clear in our opinion that it should be sustained.

Statement of the Case.

Had the agreement been made with less deliberation or pending a peril more imminent our conclusion might have been different.

The decree of the Circuit Court of Appeals must therefore be reversed and the case remanded to the District Court for the Eastern District of Texas with directions to execute its original decree.